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# Supreme Court of the United States

October Term, 1973

No. 73- 296

LAWRENCE S. HUFFMAN, As Prosecuting Attorney for Allen County, Ohio, and EDWARD FAIR, as Sheriff of Allen County, Ohio,

*Appellants,*

v.

PURSUE, LTD.

*Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION.

## JURISDICTIONAL STATEMENT

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IN THE

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No. 73-

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*Appellants,*

v.

PURSUE, LTD.

*Appellee.*

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION.**

## JURISDICTIONAL STATEMENT

Appellants appeal from the judgement of the United States District Court for the Northern District of Ohio, Western Division (Celebrezze, Circuit Judge, and Young and Walinski, District Judges), entered on April 20, 1973, holding Ohio Revised Code Sections 3767.04 and 3767.06 to be unconstitutional and enjoining appellants herein from executing that portion of the Allen County Common Pleas Court's final judgment of Nov. 30, 1972, in *State of Ohio ex rel Lawrence S. Huffman v. William H. Dakota et al*, Court of Common Pleas of Allen County, Ohio, Case Number 72 CIV 0326,

which ordered the closing of the Cinema I Theatre at 69 Public Square, Lima, Ohio "for a period of one year unless sooner released by order of (the Common Pleas) Court pursuant to the defendant-owners fulfilling the requirements provided in Section 3767.04 of the revised Code of Ohio".

## OPINION BELOW

The opinion of the District Court for the Northern District of Ohio, Western Division, has not been reported as yet. A copy of the Opinion and Order, as filed on April 20, 1973, is attached hereto at Appendix A, pp. 3-12.

## JURISDICTION

On Dec. 1, 1972, Appellee corporation filed an action in the United States District Court for the Northern District of Ohio, Western Division, entitled *Pursue, Ltd., v. Lawrence S. Huffman, in his capacity as Prosecutor of Allen County, Ohio and Edward Fair, in his capacity as Sheriff of Allen County, Ohio,* CIV 72-432, alleging a Civil Rights cause of action under 42 U.S.C. Sections 1983 and 1985, together with motions for a temporary restraining order, preliminary and final injunction, and an application for a 3-judge court. On Dec. 11, 1972, the Sixth Circuit Court of Appeals designated Circuit Judge Anthony J. Celebrezze, and District Court Judges Nicholas J. Walinski and Don J. Young as members of the Three-Judge District Court, which subsequently handed down the aforementioned opinion and order dated April 20, 1973. The Notice of Appeal was filed in the United States District Court on May 14, 1973. Appellants petitioned this Court for a Writ of Mandate or Prohibition in *Huffman et al v. The United States District Court for The Northern District of Ohio, Western Division et al,* No. 72-1613, docketed on June 1, 1973, which matter is presently pending before this Court. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28 U.S.C. Sections 1253 and 2101(b).

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Bailey v. Patterson*, 369 U.S. 31, 34, 7 L.Ed. 2d 512, 82 S.Ct. 549 (Feb. 26, 1962).

## QUESTIONS PRESENTED

(1) (a) Whether it was the intent of Congress, in enacting the Civil Rights Act of 1871 (42 U.S.C. Sections 1983 and 1985), to authorize a federal cause of action, where the state action against which relief is sought, is a civil action in rem brought in the name of the people of the State of Ohio, which pleads specifically the violation of specific state standards for sexual conduct in public in the form of obscene motion picture films being exhibited as a regular course of conduct, and which seeks to abate the place where such conduct takes place, as a disorderly house.

(b) Assuming that, in theory, a cause of action can be stated under 42 U.S.C. Section 1983 and 1985 of the Civil Rights Act, whether Pursue Ltd. failed to plead the highly specific facts required for such a cause of action, and whether the federal court erred in failing to examine the course of conduct which was alleged and proved in the state court action, and presented in Appellant's Motion to Dismiss.

(2) Whether the facts alleged provide a basis for equitable jurisdiction and federal intervention under *Younger v. Harris* and *Mitchum v. Foster;* and whether such facts presented a substantial federal question for the invocation of a three-judge district court to consider the constitutionality of the Ohio Nuisance Statute.

(3) Whether, under the doctrine of lis pendens, Pursue Ltd. had standing, under an assignment of the leasehold interest in 69 Public Square, Allen County, Ohio, to prosecute the Civil Rights action entitled, *Pursue, Ltd. v. Huffman, et al.*, 72 C 432, filed by it on Dec. 1, 1972; where, on the date that Pursue, Ltd. acquired such interest from William H. Dakota, Nov. 17, 1972, a civil action entitled *Ohio ex rel Huffman v. William H. Dakota, et al., 72* CIV 0326 was on

file in the Allen County, Ohio, Common Pleas Court, seeking to abate the premises and forfeit the lease at 69 Public Square; of which filing appellee Pursue Ltd. had actual notice from the inception of its existence as a corporation, through its incorporating attorneys and also by service of process on Robert Hollis, its president, on Nov. 22, 1972; which complaint described said premises both by metes and bounds and and by street address and named the owners of such real property and assignor, William H. Dakota as defendants, and over which property and persons the Allen County Common Pleas Court had acquired jurisdiction; and where on Nov. 30, 1972, the day before such federal action was filed by Pursue Ltd., a final judgment was entered in the Allen County Common Pleas Court, forfeiting for a period of one year the leasehold interest of defendant-assignor William H. Dakota in the premises of 69 Public Square upon which interest Pursue, Ltd. was relying; and where such final judgment was known to appellee at the time such federal action was filed, having been alleged as a fact by Pursue, Ltd. in its Complaint at page 5, paragraph 18.

(4) Whether, under the manditory provisions of 28 U.S.C. Section 2283, the United States District Court had authority to grant any injunctive relief; i.e., whether the equitable claim should not have been dismissed for lack of jurisdiction, where it appeared on the face of the complaint that:

(a) the real property which was the subject of the action was in custodia lex in the "in rem" state court proceedings, and

(b) the state appellate process was already in train, in that a final judgment had already been entered by the state trial court.

(5) Whether the Ohio obscenity statute, as construed by the Ohio judiciary and as applied by the trial judge, complied with the specificity requirements enunciated in *Miller v. California*, decided by this Court on June 21, 1973.

(6) Whether certain sections of the Ohio Nuisance Statute, entitled "Disorderly Houses" are constitutional: namely,

(a) Whether Section 3767.04 of the Ohio Revised Code is constitutional, i.e., whether under a special statutory procedure declaring a place which exhibits an obscene motion picture film to be a public nuisance and providing for its abatement, the Federal Constitution prohibits the State Legislature from establishing as a mandatory penalty, after a hearing on a temporary injunction had upon five days' notice, that, upon a judicial finding by a trial court that such a public nuisance exists, the leasehold interest where such public nuisance is conducted or maintained and the personal property and contents located and used therein shall be forfeited until final decision is rendered on the application for a permanent injunction unless either of two conditions is shown to exist, namely: 1. That the person "owning, in control, or in charge of the nuisance so enjoined...." affirmatively "shows to the satisfaction of the court. . . that the nuisance complained of is abated. . . .", or 2. That the lessor of such a place, being used by the tenant for the purpose of lewdness, affirmatively shows to the satisfaction of the court that he proceeded forthwith to void the tenant's lease as authorized by the statute and has regained possession of the premises; where such statute also allows the owner of any real property so restricted to appear at any time between the filing of the petition to abate the nuisance and the hearing on the application for a permanent injunction therein, and to regain possession of such real property by fulfilling three requirements, namely, 1. Payment of all costs incurred; 2. Filing a bond as owner of such real property conditioned that he will immediately abate the nuisance and prevent the same from being maintained until decision by the court on the application for a permanent injunction, and 3. Satisfying the court of his good faith; and where such statute also allows the owner of any personal property so restricted to appear at any time between the filing of the petition to abate the nuisance and the hearing on the application for a permanent injunction therein and to regain possession of such personal property by fulfilling two requirements, namely, 1. Payment of all costs incurred, and 2. Satisfying the court of his innocence of any knowledge of the use of such personal property as a nuisance and that with reasonable care he could not have known thereof.

(b) Whether Section 3767.06 of the Ohio Revised Code is constitutional, i.e., whether under a special statutory procedure declaring a place which exhibits an obscene motion picture film to be a public nuisance and providing for its abatement, the Federal Constitution prohibits the state legislature from establishing as a mandatory penalty after a hearing on a permanent injunction that, upon a judicial finding by a trial court that such a public nuisance exists, the same shall be abated and the leasehold interest where such public nuisance is conducted or maintained shall be forfeited for a period of one year from the date of the final order of abatement unless sooner released by order of the court, and that the personal property and contents located and used therein and not already released, (as authorized by Section 3767.04), shall be forfeited and sold not earlier than 10 days after such final order of abatement and in the manner provided for the sale of chattels under execution; where such statute also allows the owner of any real property so restricted to renter and regain possession of such real property after such order of abatement by fulfilling three requirements, namely, 1. Payment of all costs incurred; 2. Filing a bond as owner of such real property conditioned that such person will immediately abate the nuisance and prevent the same from being so kept for one year from the final order of abatement, and 3. Satisfying the court of his good faith; and where such statute also allows the owner of any personal property so restricted to regain possession of the same, if claimed within 10 days after such final order of abatement, by fulfilling two requirements, namely, 1. Payment of all costs incurred, and 2. Proving, to the satisfaction of the court, innocence of any knowledge of said use thereof, and that with reasonable care and diligence he could not have known thereof.

## STATUTORY PROVISIONS INVOLVED

The Ohio Nuisance Statute entitled "Disorderly Houses" being sections 3767.01 through 3767.11 of the Ohio Revised Code, is attached hereto at Appendix B, pages 3-8. The specific standards for the term "obscene" prescribed by the Ohio legislature in Ohio Revised Code section 2905.34 appear herein, at pages 58-59.

## STATEMENT OF FACTS

On September 18, 1972, at 1:06 P.M., appellant Lawrence S. Huffman, as prosecuting attorney of Allen County Ohio, filed a complaint in the Court of Common Pleas of Allen County, Ohio, entitled "State of Ohio ex rel Lawrence S. Huffman v. William H. Dakota, et al, Case No. 72 CIV 0326," seeking the abatement of the Cinema I Theatre located at 69 Public Square, Lima, Ohio, as a public nuisance. A copy of said complaint is attached hereto at Appendix C, pages 3-13. Such action was commenced pursuant to Section 3767.03 of the Ohio Revised Code (see Appendix B, at page 4). At the same time, appellant Huffman filed his Motion for Temporary Injunction, a copy of which is attached hereto at Appendix C, pages 14-16.

The Court of Common Pleas assigned appellant Huffman's Motion for Temporary Injunction in State of Ohio ex rel *Huffman v. William H. Dakota* for September 26, 1972, at 9:30 A.M. A copy of said Notice for Hearing is attached hereto at Appendix C, page 17. On the same date, the Clerk of the Common Pleas Court issued a subpoena duces tecum addressed to William H. Dakota and John Does 1 and 2, requiring them to appear and testify on behalf of the plaintiff in said action and to bring with them the 21 motion picture films listed below which were exhibited at that theatre during the dates indicated:

| | |
|---|---|
| "Man and Wife" | July 12-18, 1972 |
| "Hollywood Babylon", "Down and Dirty", and Previews | July 19-23, 1972 |
| "The Hangup", "The Cutthroats", and Previews | July 25-Aug. 1, 1972 |
| "Wow, Its Cindy", "Hot Spurs", and Previews | Aug. 2-8, 1972 |

| | |
|---|---|
| "Prostitution, Pornography, U.S.A." "Oddly Coupled" and Previews | Aug. 9-15, 1972 |
| "Sandra, The Making of a Woman", "Diamond Stud" and Previews | Aug. 16-22, 1972 |
| "Midnight Plowboy", "Tobacco Roody" and Previews | Aug. 23-29, 1972 |
| "The Blue Hour" "The Grabbers" and Previews | Aug. 30-Sept. 5, 1972 |
| "Sweet Georgia", "The Exotic Dreams of Casanova" and Previews | Sept. 6-12, 1972 |
| "Marriage Manual", "Love Under 17", and Previews | Sept. 13-18, 1972 |
| "The Pig Keeper's Daughter", "Please Don't Eat My Mother", and Previews | Sept. 19-25, 1972 |

A copy of said Subpena Duces Tecum is attached hereto at Appendix C, page 18.

On September 18, 1972, at approximate 2:40 P.M., a deputy sheriff personally served a summons and copies of the Complaint, Motion for Temporary Injunction, Notice for Hearing, and Subpoena Duces Tecum on the following persons at the Cinema I Theatre, 69 Public Square, Lima, Ohio:

John Doe No. 1, later identified as John Brownell; and

John Doe 2, later identified as Robert Smith;

Also served with the documents aforementioned, with the exception of the subpoena duces tecum and in lieu thereof,

a subpoena, were John Doe 3, later identified as Allen R. Brown, and Jane Doe No. 1, later identified as Geraldine Scott. At the time of the service of these documents, John Brownell was the projectionist at the Cinema I Theatre; Robert Smith was the person in charge of said theatre in the absence of the manager, William H. Dakota; Allen R. Brown was the ticket taker and Geraldine Scott was the ticket seller.

On the evening of Sept. 18, 1972, William H. Dakota was served with a summons and copies of the Complaint, Motion for Temporary Injunction, Notice for Hearing, and Subpoena Duces Tecum at the Cinema I Theatre, No. 69 Public Square, Lima, Ohio.

The owners of the premises, also named as defendants in appellant Huffman's abatement action, were subsequently served with process.

On Sept. 20, 1972, appellant Huffman filed an amended complaint in the Court of Common Pleas and thereafter copies of the Amended Complaint were served upon all of the persons previously served as aforementioned. A copy of the Amended Complaint is attached hereto at Appendix D, pages 3-8.

On Sept. 26, and Sept. 27, 1972, the Court of Common Pleas of Allen County, Ohio, convened a hearing on appellant Huffman's Motion for Temporary Injunction in State of Ohio *ex rel Huffman v. William H. Dakota et al,* at which time, the defendants in the abatement action were present and represented by counsel. Evidence was presented, including the viewing by the Court of four motion picture films which had been subpoenaed, entitled "Love Under 17", "Marriage Manual", "The Pig Keeper's Daughter", and "Please Don't Eat My Mother," and previews of coming attractions. At the conclusion of the presentation of evidence on Sept. 27, 1972, the court ordered that the matter be continued to Oct. 2, 1972, at which time additional evidence was presented by both the plaintiff and the defendants, after which the parties rested. At no time did the defendants offer any evidence to the court that the nuisance complained against had

been abated. The Court took the matter under advisement and announced that a decision on the temporary injunction would be made forthwith.

On Oct. 24, 1972, the Court of Common Pleas of Allen County, Ohio, announced its decision in State of Ohio *ex rel Huffman v. William H. Dakota et al,* and journalized its order. A copy of such order is attached hereto at Appendix E, pages 3 and 4. In its order the Court made the following findings: 1. That a nuisance exists as alleged at the Cinema I Theatre, 69 Public Square, Lima, Ohio, which should be abated forthwith; 2. That the realty is owned by the defendants Leland Samuel Collins, Flora Mary Collins Moor, and Sara Lee Collins Wallace; and 3. That William H. Dakota is the person in charge of said theatre and is maintaining said nuisance, and that the defendants Smith, Brown, Brownell and Scott are employed at said theatre. The court ordered the Cinema I Theatre closed, restrained the defendants from removing or in any manner interfering with personal property and contents of the premises at Cinema I Theatre until further order of the Court and ordered the officer serving the Court's order to forthwith make and return into court an inventory of the personal property and contents situated in the building and used in conducting or maintaining the motion picture projection and screening therein. The Court also ordered the defendants to show cause, if any they can, why the closing order should not be made permanent as of that date.

The premises known as Cinema I Theatre, 69 Public Square, Lima, Ohio, was closed pursuant to said order of the Allen County Common Pleas Court and the statutory mandate of O.R.C. Section 3767.04.

On October 26, 1972, William H. Dakota, the defendant in the state abatement action, *Ohio ex rel Huffman v. William H. Dakota et al,* filed a civil rights complaint in the United States District Court, Northern District of Ohio, Western Division, entitled *"William Dakota v. Edward Fair, Sheriff, and Joe Garlock, Deputy Sheriff, Civil Case No. 72-384,"* alleging a cause of action under 42 U.S.C. Section 1983, together with Motions for a Temporary Restraining Order, a Preliminary Injunction, and to convene a 3-judge panel.

Dakota also filed a "Memorandum of Law on Effect of Removal on State Court Action" in the Allen County Common Pleas Court on the same date. A copy of said pleadings is attached hereto at Appendix F, pages 3 to 24. Arguments on the Motion for Temporary Restraining Order were heard on October 30, 1972, and the matter was taken under advisement.

Thereafter, United States Federal District Judge Nicholas J. Walinski, Northern District of Ohio, Western Division, ruled, in an opinion and order filed in said federal action on Nov. 2, 1972, that the injunction of the state court, "has been overbroadly applied" and flew directly in the face of the United States Supreme Court decision in *Near v. Minnesota*, 283 U.S. 697 (1931), and ordered that the state court injunction be stayed "so far as it affects the showing of films which have not been held to be obscene in a prior adversary hearing." Judge Walinski further stated in his opinion that since the Ohio court may interpret the statute constitutionally upon a hearing for the permanent injunction, he would "reserve a ruling on the convening of a 3-judge panel under 28 U.S.C. Section 2284 until such time as the federal abstention doctrine is inapplicable." A copy of Judge Walinski's opinion and order appear herein at Appendix G, pages 3-4.

In an attempt to comply with Federal District Judge Walinski's order of Nov. 2, 1972, appellant Huffman on Nov. 5, 1972, filed a motion in the state case, *State of Ohio ex rel Huffman v. William H. Dakota, et al.* Court of Common Pleas of Allen County, No. 72 Civ 0326 alleging that on November 4, 1972, William H. Dakota had violated the terms of the Allen County Common Pleas Court order of Oct. 24, 1972 by exhibiting two obscene motion picture films, entitled "Sexual Freedom Now" and "Shoot-out at Beaver Alls (sic)", which depicted numerous scenes of sexual intercourse, cunnilingus and fellatio and asked the court to order William Dakota to appear with the films so that the court might determine whether said films were obscene and to show cause why he should not be punished as for a contempt. On the same day, the court ordered that William H. Dakota should appear in Court with said films on November 7, 1972, at 9:00 A.M., which was also the same hearing date previously

scheduled for appellant Huffman's Motion for a Permanent Injunction, so that a determination could be made as to whether such films were obscene and, upon such a determination, to show cause why he should not be punished as for contempt. A copy of said motion and said court order (journal entry) appear hereinafter at Appendix H, pages 3 and 4.

On Nov. 7, 1972, the Court of Common Pleas of Allen County, Ohio, convened and evidence was presented on appellant Huffman's application for a permanent injunction. At the conclusion of the evidence presented on that date, the court, with concurrence of counsel for the plaintiff and the defendants, continued the hearing on the permanent injunction in anticipation that the suit might be settled. The hearings on the application for permanent injunction was rescheduled for Nov. 30, 1972.

On Nov. 22, 1972, upon information and belief that a new party, Robert Hollis[1], was violating the Common Pleas Court order of October 24, 1972, (See Appendix E) by participating in the exhibition of obscene motion picture films at the Cinema I Theatre, appellant Huffman caused a certified copy of the Common Pleas Court order of Oct. 24, 1972, to be personally served upon Robert Hollis.

On Nov. 30, 1972, the Court of Common Pleas of Allen County, Ohio, reconvened in Ohio *ex rel Huffman v. William H. Dakota et al*, on the matter of the application for permanent injunction. Counsel for the defendant William H. Dakota and other defendants employed at the Cinema I Theatre, were not present at said hearing, having advised the court that the court could proceed in the hearing of the cause without the appearance of the defendants or their counsel." Additional evidence was presented by appellant Huffman in such state action, including testimonial evidence from police officers who had viewed 12 other motion picture films which were alleged in appellant Huffman's complaint to have been exhibited at the Cinema I Theatre and to be obscene, and documentary evidence consisting of approxi-

[1]See Appendix AA page 7.

mately 8,000 still photographs in the form of time-motion studies of the said 12 motion picture films. Such time-motion studies consisted of a chronological series of still photographs from the motion picture films, timed in their relative order of appearance, which by stopping the movement appearing on the motion picture screen and recording the same, permitted the type of conduct being portrayed therein to be analyzed by the officer giving testimony as to what he saw exhibited at the motion picture theatre as a part of the past recollection recorded testimony of such witness.

On Nov. 30, 1972, at approximately 2:30 P.M. the Allen County Common Pleas Court granted a permanent injunction and thereafter journalized its order. A copy of said judgment entry appears herein at Appendix I, pages 2-4. In its final judgment, the court made the following findings: 1. That the Cinema I Theatre at 69 Public Square, Lima, Ohio, is operated by defendant William H. Dakota; 2. That the defendant William H. Dakota has engaged in a course of conduct of displaying motion picture films at said Cinema I Theatre which are obscene under the Ohio test for obscenity; 3. That the defendant's conduct and continuous exhibition of obscene motion picture films constitutes a public nuisance as defined by the Ohio Revised Code, Section 3767.01(c); 4. That the defendants, Flora Mary Collins Moor, Leland Samuel Collins, and Sara Lee Collins Wallace are the owners of the premises being used by the defendant William H. Dakota to engage in the conduct which constitutes the nuisance; 5. That said owners leased said premises to the defendant William H. Dakota under the name of William Kern, Jr. and that the defendants Brownell, Smith, Brown, and Scott are employed at the theatre. The court ordered the following: 1. Permanently enjoining the defendants and all of the persons acting in concert or participating with them from conducting the said nuisance; 2. Assessed a tax of $300.00 against the Cinema I Theatre and against William H. Dakota personally; 3. Ordered all personal property used in conducting the nuisance as aforesaid to be removed from 69 Public Square, Lima, Ohio, and sold in the manner provided for

the sale of chattels under execution; and 4. Extended its order of Oct. 24, 1972, closing the Cinema I Theatre, issued by way of preliminary injunction, and forfeited the lease and ordered it closed for any purpose for a period of one year unless sooner released by order of this court pursuant to the defendant-owners fulfilling the requirements provided in Section 3767.04 of the Ohio Revised Code and ordered the defendant William H. Dakota to pay the costs therein.

Within two hours of the entry of the final judgment forfeiting the lease for a period of one year, the theatre was closed and the keys seized by law enforcement agents. (See page J-7)

On Dec. 1, 1972, appellee corporation filed an action in the United States District Court for the Northern District of Ohio, Western Division, entitled *Pursue, Ltd. v. Lawrence S. Huffman, in his capacity as Prosecutor of Allen County, Ohio, and Edward Fair, in his capacity as Sheriff of Allen County, Ohio,* CIV 72-432, alleging a Civil Rights cause of action under 42 U.S.C. Section 1983, together with motions for a temporary restraining order, preliminary and final injunction and application for a 3-judge court. A copy of said complaint is attached hereto at Appendix J, pages 3-15.

On Dec. 1, 1972, the same date that the federal action was filed, United States District Court Judge Nicholas J. Walinski entered an ex parte order in such action, "to prevent great and irreparable harm to the plaintiff, prior to the convening of a 3-judge court in this matter, pursuant to 28 U.S.C., Section 2248" which ordered the judgment of the Allen County Common Pleas Court in *State ex rel Huffman v. William H. Dakota et al.*, 72-CIV-0326, dated Nov. 30, 1972, stayed except "insofar as any order which may apply to films that have previously been declared obscene in a prior adversary hearing". A copy of said order appears herein at Appendix J, page 16.

In an attempt to enforce the order of the Common Pleas Court of Nov. 30, 1972, while still complying with the federal court order filed on Dec. 1, 1972, appellant filed a motion in the state court in *State ex rel Huffman v. William H. Dakota, et al.*, 72-CIV-0326, on Dec. 4, 1973, requesting that

the films located at 69 Public Square, Lima, Ohio, be viewed by the court and that a judicial determination be made as to whether or not said films were obscene and upon a finding of obscenity, that the court order said films not to be exhibited at 69 Public Square, Lima, Ohio, and set Dec. 4, 1972, as the hearing date. A copy of said motion and notice of hearing appears herein at Appendix K, page 3.

On Dec. 4, 1972, upon notice to counsel for defendant Robert Smith and Robert Hollis, the Court of Common Pleas of Allen County, Ohio, convened in *Ohio ex rel Huffman v. William H. Dakota, et al.* 72 CIV 0326 to hear Appellant Huffman's motion therein for a hearing on said films and the court viewed the motion picture film entitled "Sexual Freedom in Denmark." said film having been subpoenaed by appellant Huffman. The court granted the request of Ted Iorio, counsel for Robert Smith and Robert Hollis, to withhold making a decision as to the obscenity of said motion picture film to enable counsel to present evidence that said motion picture film was not obscene, and set the matter for hearing on Dec. 12, 1972 in the Court of Common Pleas of Allen County, Ohio.

On Dec. 11, 1972, the day prior to said hearing date, counsel Ted Iorio, counsel for Robert Smith and Robert Hollis, filed a petition for removal in the United States District Court for the Northern District, Western Division, entitled *State of Ohio ex rel Lawrence S. Huffman, respondent v. William H. Dakota, et al.*, petitioner, Case No. C72-445, and Notice of Removal with the Clerk of the Allen County Common Pleas Court and served the same on Appellant Huffman. Said removal frustrated appellant's attempt to enforce the state court order while still complying with the federal court's temporary restraining order. A copy of said petition for removal and notice of removal appears herein at Appendix L.

On December 11, 1972, the Sixth Circuit Court of Appeals designated Circuit Judge Anthony J. Celebrezze, District Court Judges Nicholas J. Walinski, and Don J. Young as members of the three-judge District Court in *Pursue, Ltd. v. Huffman, et al.*, 72 Civ 432. On December 21, 1972, said

three-judge District Court ordered all parties to file briefs in the matter on or before January 15, 1973. Copies of such orders appear herein at Appendix L, pages 18-20.

On December 18, 1972, appellant Huffman filed a motion to remand and supporting memorandum and a motion for immediate hearing, in *William H. Dakota et al. v. Lawrence S. Huffman*, 72 Civ 445, a copy of which appears herein at Appendix L, pages 8-17.

On December 29, 1972, Pursue, Ltd. filed amendments to its complaint in *Pursue, Ltd. v. Huffman, et al.* 72 Civ 432 and on January 5, 1973, appellants filed their answers thereto. A copy of said amendments and answers appears herein at Appendix M, pages 3 to 15.

Appellants herein filed their trial brief in the federal action, *Pursue, Ltd. v. Huffman, et al.*, 72 Civ 432 on January 16, 1973. At page 3 of their trial brief, appellants pointed out to the three-judge court that Pursue, Ltd.'s federal lawsuit was spurious, that it constituted an abuse of the federal process and was prosecuted for the sole purpose of continuing the exhibition of obscene motion picture films and deriving as much income as possible from their exhibition; further, that in view of the evidence in this case, Pursue, Ltd. had no reasonable hope of establishing the necessary prerequisites for success in federal intervention, namely: 1. Bad faith; 2. Harassment; and 3. Great and immediate irreparable harm. In support of those contentions, appellants attached thereto four affidavits of Deputy Sheriff Fred H. Hawk, describing the contents of eight (8) films viewed by said affiant at the Cinema I Theatre subsequent to the federal court order of Nov. 2, 1972, which reopened that theatre, and the alleged assignment of November 24, 1972, from William H. Dakota to Pursue, Ltd. Deputy Sheriff Hawk's description of the eight films viewed by him on the following dates reads as follows:

Dec. 7, 1972

"Affiant says that the credits of 'Skin Flick Madness' showed that it was produced by 'Suckit Films'; that the general theme of the movie centered about a male and female viewing a stag film, becoming excited by the

various sexual acts depicted in the stag film and engaging in sexual activity themselves during the stag film; and that the movie lasted approximately 55 minutes during which time nude males and nude females were depicted on the screen engaging in several explicit acts of fellatio, sexual intercourse, lesbianism and cunnilingus.

'Affiant says that the second feature was entitled 'Okie Maid' which lasted approximately 50 minutes; that the general theme of the movie centered about the sexual activities of three men who lived together in a mountain shack; and that the movie had several explicit scenes of nude males and nude females engaged in acts of lesbianism, cunnilingus, female masturbation, group sex, sexual intercourse, rape, fellatio and anal sodomy.

"Further affiant saith not."

Dec. 14, 1972

"Affiant says that the first feature he viewed was entitled 'The Honeymoon Is Over' which lasted approximately one hour; that the general theme of the movie centered about the sexual frustrations and inadequacies of a newly married couple; and that the motion picture contained several explicit scenes of nude males and nude females engaged in acts of sexual intercourse, cunnilingus, lesbianism, and fellatio.

"Affiant further says that he viewed the second motion picture entitled 'Brit Blazer' which lasted approximately one hour; that the general theme of the movie centered about the kidnapping of a female and her rescue by a female secret agent, Brit Blazer; that the feature contained several explicit scenes of nude males and nude females engaged in acts of fellatio, lesbianism and cunnilingus.

"Further affiant saith not."

Dec. 30, 1972

"Affiant says that the first feature he viewed was entitled 'Bells, Books and Balls' which lasted approximately one hour; that there was no general theme of the movie ascertainable by the affiant; and that the movie contained several explicit scenes of nude males

and nude females engaged in acts of group sex, sexual intercourse, lesbianism, fellatio and cunnilingus.

"Affiant says that he viewed the second feature entitled 'Mother Knows Best' which lasted approximately one hour; that the general theme of the movie centered about the sexual adventures of a mother and daughter traveling to the West Coast; that the film contained several explicit scenes of nude males and nude females engaged in acts of sexual intercourse, lesbianism and cunnilingus.

"Further affiant saith not."

Jan. 10, 1973

"Affiant says that the first motion picture he viewed was entitled 'The Hedonist-Hypnotist' which lasted approximately one hour; that the general theme of the feature centered about the use of hypnosis to effectuate sexual relations; and that the movie contained several explicit scenes of nude males and nude females engaged in acts of sexual intercourse, fellatio, cunnilingus, and group sex.

"Affiant says that he viewed the second feature entitled 'Documentary of a Madam' which lasted approximately one hour; that the general theme of this feature centered about the activities of a brothel; and that the movie contained several explicit scenes of nude males and nude females engaged in acts of sexual intercourse, fellatio, cunnilingus and lesbianism.

"Further affiant saith not."

A copy of Point 3 of the trial brief and the four affidavits of Deputy Sheriff Hawk, referred to above, appears herein at Appendix N, pages 3 to 11.

On February 12, 1973, appellants herein filed three motions with detailed supporting memoranda in *Pursue, Ltd. v. Huffman*, 72 Civ 432, namely: 1. A Motion to Dismiss; 2. A Motion to Dissolve the Temporary Restraining Order, and 3. A Motion for Immediate Hearing. Copies of said motions and the supporting memoranda appear herein at Appendix O, pages 3 to 12. In the memoranda which supported said motions, appellants herein pointed out to the federal court

that the federal action, *Pursue Ltd. v. Huffman*, 72 Civ 432, was a sham pleading brought in bad faith, and that to permit further recognition thereof would only perpetuate the fraud and the resultant gross abuse of the federal judicial process already thrust upon the court. The memorandum in support of the Motion for Immediate Hearing states, in part, as follows (See Appendix O, page 10):

> "In support of defendants' allegations, defendants have attached to and incorporated by reference Exhibits A, B and C to their motions to dissolve temporary restraining order and to dismiss which are affidavits of persons who have seen the motion pictures exhibited by plaintiff at subject premises for three successive weeks, January 10-30, 1973, together with photographic reductions of time-motion studies of said motion picture films. Tape recordings have been made of said films and will be available at the hearing of defendants' Motions to Dissolve Temporary Restraining Order and to Dismiss. (A copy of the said time-motion studies are not attached to copies of said motions served upon counsel for plaintiff as only one copy is presently available; said time-motion studies are available to plaintiff's counsel in the Clerk's Office, having been previously filed herein).
>
> "Plaintiff's continuous exhibition of obscene motion picture films and abuse of the federal judicial process to perpetuate a fraud upon this court is flagrant and without precedent. Unfortunately, this court has been placed in a position of making an order based upon a contention of great and immediate irreparable injury by plaintiff which has, as the attached exhibits demonstrate, resulted in great and immediate irreparable harm to the citizens of the State of Ohio, not the plaintiff . . . ."

A copy of the affidavits of the law enforcement officers which described to the court the nature of the subject matter being exhibited at the Cinema I Theatre, during the period January 10-30, 1973, and copies of the time-motion studies of said films, which accompanied said affidavits when they were filed with the three-judge Federal District Court on February 12, 1973, appear herein at Appendix P, pages 1-39, Ap-

pendix Q, pages 1-41, and Appendix R, pages 1-51.

On February 12, 1973, appellants herein also filed a second motion for an immediate hearing with supporting memorandum on the motion to remand in *William H. Dakota v. Huffman, et al.*, 72 CIV 445, previously filed with the Court on December 18, 1972 (see page L-15). A copy of the second motion appears herein at Appendix O, pages 13-16. On March 12, 1973, not having heard anything from the court on the two previous motions for immediate hearings on the motion to remand in *William H. Dakota v. Huffman, et al.* 72 CIV 445, appellants filed an additional memorandum. A copy of the March 12, 1973 memorandum appears herein at Appendix O, pages 17 to 24.

The three-judge Federal District Court heard oral arguments on the temporary restraining order in *Pursue, Ltd. v. Huffman, et al.* 72 CIV 432, on March 12, 1973. A copy of the transcript of the March 12 proceedings (hereinafter referred to by the designation "T") has been lodged with the Clerk of this Court as Exhibit 1 to the Petition for a Writ of Mandate or Prohibition, in *Huffman et al v. United States District Court for The Northern District of Ohio, Western Division*, No. 72-1613, on file with this Court (See Infra, at page 26). During such proceedings, the court defined the scope of the hearing as:

> "THE COURT: The Court wishes to inform counsel that the only question before this three-judge court is the constitutionality of the so-called Ohio Nuisance Statute. . . ." (T, page 2, lines 8-11.)

and

> ". . . The question, as Judge Celebrezze pointed out is whether or not the Ohio Nuisance Statute, that is Ohio Revised Code 3767.01 and the following sections can be employed to close a theatre as a public nuisance . . . ." (T, page 2, lines 19-22.)
>
> "THE COURT: I am sure counsel is aware we can hold a statute constitutional, but unconstitutional as it being applied and that - - well, the question before us is if that was a constitutional section there, we still would also

reserve the right to make the determination whether you are applying it constitutionaly. . . ." (T. page 19, lines 16-22.),

While the court indicated at the time that it was considering the constitutionality of the statute as it was being applied in the case, it arbitrarily and unreasonably refused to consider Appellant's motion to dismiss and evidence by way of affidavits on the trial court's finding of a public nuisance. See T. page 29, lines 3-20 and also the four affidavits of Deputy Sheriff Hawk filed with Part 3 of the trial brief and referred to herein at page 43.

On April 20, 1973, the court issued its opinion and order holding the closure portions of the Ohio Nuisance Statute, Sections 3767.04 and 3767.06, unconstitutional and enjoined the appellants herein from executing that portion of the Allen County Common Pleas Court final judgment of November 30, 1972, in *State of Ohio ex rel Huffman v. William H. Dakota, et al.*, 72 CIV 0326, which ordered the closing of the Cinema I Theatre at 69 Public Square, Lima, Ohio, "for a period of one year unless sooner released by order of Court pursuant to the defendant-owners fulfilling the requirements provided in Section 3767.04 of the Revised Code of Ohio . . . ." (See Appendix A, at pages 10 to 12.)

On April 26, 1973, the three-judge Federal District Court, sua sponte, filed an opinion and order dismissing *William Dakota et al. v. State of Ohio ex rel Lawrence S. Huffman*, 72 CIV 445 as being moot. A copy of said order appears herein at Appendix 5, page 3.

On May 1, 1973, appellants herein again sought judicial enforcement of the Ohio Statute in the Common Pleas Court in the civil action, *Ohio ex rel Huffman v. William Dakota, et al.*, 72 CIV 0326. On that date, appellants filed a motion in the Common Pleas Court to determine the obscenity of three motion picture films then being shown at the Cinema I Theatre: "Just Married", "Back Door", and "Bob Dick", which depicted numerous scenes of sexual intercourse, cunnilingus and fellatio; and the Common Pleas Court set May 3, 1973, as the hearing date on that motion. A subpoena duces tecum was issued and served on May 1, 1973, upon Robert

Smith, known by the appellants to be the new manager of the Cinema I Theatre, and Projectionist John Doe. Copies of the motion, journal entry and subpoena duces tecum appear herein at Appendix T, pages 3 to 6.

On May 3, 1973, before the scheduled hearing in the Common Pleas Court in *State ex rel Huffman v. Dakota*, 72 CIV 0326 had commenced, the defendants filed a second petition for removal in the Federal District Court, entitled *William H. Dakota v. State ex rel Huffman*, 73 CIV 176, ousting the Common Pleas Court of its jurisdiction in the matter. On May 14, 1973, appellants herein again returned to the Federal Court, this time in *William H. Dakota v. State ex rel Huffman*, 73 CIV 176, and filed a motion to remand with supporting memorandum and a motion for immediate hearing thereon, with supporting memorandum, including the affidavit of Deputy Sheriff Hawk as to the content of the three films. The motion for immediate hearing was overruled on May 22, 1973. Copies of the petition for removal and accompanying papers, and the motion for remand, affidavits, and accompanying papers appear herein at Appendix U, pages 3 to 29.

Having been ousted of jurisdiction in the civil process by the petition for removal filed on May 3, 1973, appellant authorized criminal filings against the manager of the Cinema I Theatre, Robert Smith, in *State of Ohio v. Robert Smith*, 73 CR 093. On May 4, 1973, a summons was issued in lieu of an arrest warrant for Robert Smith, manager of the theatre, supported by a criminal affidavit. At the time of filing of the affidavit, a motion for prior adversary hearing was filed with the Common Pleas Court, supported by an affidavit of a policeman who had observed the motion picture films in issue, "Back Door", "Just Married" and "Bob Dick", who described in detail what he saw. The Common Pleas Court signed an order assigning the matter for a hearing on May 7, 1973. At the same time, a subpoena duces tecum was issued for the motion picture films in question, to be served upon Robert Smith, the manager, and Otis Hatfield, the projectionist. On the evening of May 7, 1973, Smith was served with copies of all of the abovementioned papers and Otis

Hatfield, the projectionist, was served with a subpoena duces tecum only. Copies of the above papers appear herein at Appendix V, pages 3 to 10.

On May 7, 1973, before the scheduled hearing in the Common Pleas Court had commenced, the defendant in *State of Ohio v. Smith*, 73 CR 093, filed a petition for removal in the Federal District Court, entitled *Smith v. State of Ohio*, 73 C 180. On May 14, 1973, appellants herein again returned to the Federal District Court and filed a motion for remand with supporting memorandum, and a motion for immediate hearing with supporting memorandum. The motion for immediate hearing was overruled on May 22, 1973. Copies of the petition for removal in *Smith v. State of Ohio*, 73 C 180, and accompanying papers, and petitioners' motion to remand and accompanying papers appear herein at Appendix W, pages 3 to 21.

On May 8, 1973, petitioner again filed criminal charges, this time against both the manager and the theatre in *State of Ohio v. Smith*, 73 CR 098 and *State of Ohio v. Pursue, Ltd.* 73 CR 099.

On May 8, 1973, in *State of Ohio v. Smith*, 73 CR 098, a summons was issued in lieu of an arrest warrant for Robert Smith, as manager of the Cinema I Theatre, supported by a criminal affidavit. At the time of the filing of the affidavit, a motion for prior adversary hearing was filed with the Common Pleas Court supported by an affidavit of a policeman who had observed the motion picture films at issue, "The Wedding" and "Sex And The Working Girl", who described in detail what he saw. The Common Pleas Court by journal entry assigned the matter for a hearing on May 10, 1973, and a subpoena duces tecum was issued for the motion picture films in question. On the evening of May 8, 1973, Robert Smith was served with copies of all of the above papers and Qtis Hatfield, the projectionist, was served with a subpoena duces tecum only. Copies of the above papers appear herein at Appendix X, pages 3 to 10.

On May 8, 1973, in *State of Ohio v. Pursue, Ltd.*, 73 CR 099, a summons was issued in lieu of an arrest warrant supported by a criminal affidavit. At the time of the filing of the

affidavit, a motion for prior adversary hearing was filed with the Common Pleas Court, supported by an affidavit of the policeman who had observed the motion picture films at issue, who described in detail what he saw. The Common Pleas Court, by journal entry, assigned the matter for a hearing on May 10, 1973, and a subpoena duces tecum was issued for the motion picture films in question. On the evening of May 8, 1973, manager Robert Smith was served with copies of all of the above papers as the agent of Pursue, Ltd., pursuant to Ohio Rules of Civil Procedure which were applicable as to the service of process upon a corporate defendant. Otis Hatfield, the projectionist, was served with a subpoena duces tecum only. Copies of the above papers appear herein at Appendix Y, pages 3 to 10.

On May 10, 1973, a hearing was conducted in *State of Ohio v. Pursue, Ltd.*, 73 CR 099. Prior to the entry of a plea, Pursue, Ltd. moved to quash the service of summons and the court instructed counsel to submit briefs on that issue. On May 14, 1973, appellants herein filed a brief on behalf of the State of Ohio, a copy of which appears at Appendix Y, pages 11-12.

On May 10, 1973, a hearing was conducted in the Allen County Common Pleas Court in *State of Ohio v. Smith* 73 CR 098, at which time both Smith and Hatfield refused to produce the films, named in the subpena duces tecum, pleading the Fifth Amendment. Thereupon, the State of Ohio presented independent evidence to show that Smith and Hatfield were, in fact, in possession of the described films at the time of service of process. The Common Pleas Court held both in contempt and ordered them incarcerated for a period of ten days in the Allen County Jail, or for such lesser time as was necessary to make them produce the films, and on May 11, 1973, journalized the contempt citations against Smith and Hatfield in 73 CR 098, copies of which appear herein at Appendix Z, pages 3-6.

On May 11, 1973, a petition for a writ of habeas corpus was filed in the Federal District Court on behalf of Smith and Hatfield in C 73-187. Upon the filing of the petition, the Federal District Court issued an order releasing Smith and

Hatfield from the Allen County Jail, a copy of which order appears herein at Appendix Z, page 7. On May 11, 1973, the order was served on the Sheriff of Allen County, who accordingly released Smith and Hatfield. On May 14, 1973, appellants herein were instructed by telephone by the Federal District Court of the content of the petition, the content of which appears at Appendix Z, pages 8-9, and that there would be a hearing on the petition for writ of habeas corpus at 2:00 P.M. on May 16, 1973.

Appellants filed a Notice of Appeal in *Pursue Ltd. v. Huffman et al* on May 14, 1973.

On May 16, 1973, appellant Fair filed an answer in C 73-187 and "Memorandum In Support of Right of Law Enforcement to require the production of films alleged to be obscene, copies of which appear herein at Appendix Z, pages 10-15.

The Articles of Incorporation on file in the office of the Secretary of State of the State of Delaware show Pursue, Ltd. to be a Delaware corporation which began its corporate existence in that State on December 6, 1972, five days after Pursue, Ltd. filed its action in *Pursue, Ltd. v. Huffman, et al.*, C 72-432, in the Federal District Court of the Northern District of Ohio, Western Division, and also shows that the only director of the appellee corporation on that date and until the first annual meeting of the stockholders, or until a successor was elected and qualified, was Robert E. Smith, whose business address is listed in said Articles of Incorporation as Suite 2005, 100 Colony Square, Atlanta, Georgia, 30309, which address is the same as that of Gilbert H. Deitsch, the counsel for record for William H. Dakota, the defendant in the Allen County Common Pleas Court and the assignor of the lease under which Pursue, Ltd. claims. Pursue Ltd., Director Robert E. Smith is also known to practice law with Gilbert H. Deitsch at the same address, Suite 2005, 100 Colony Square, Atlanta, Georgia. A copy of said Articles of Incorporation appears at Appendix AA, pages 3 to 6.

A copy of the application for license applied for by Robert L. Hollis of Pursue Ltd. on file in the Allen County

Court appears at Appendix AA, page 7. A copy of the lease for the premises at 69 Public Square endorsed with the assignment thereof, appears at Appendix AA, pages 8 to 18.

A copy of the state court docket in *State of Ohio ex rel Lawrence S. Huffman*, 72 CIV 0326, appears at Appendix AA, pages 19-22.

A copy of the federal court docket in *William Dakota v. Edward Fair et al.*, 72 C384 appears at Appendix AA, page 23.

A copy of the federal court docket in *Pursue Ltd. v. Huffman et al.*, 72 C432 appears at Appendix AA, pages 24-25.

A copy of the federal court docket in *William Dakota v. Huffman* 72 C445, appears at Appendix AA, page 26.

A copy of the federal court docket in *William Dakota v. Huffman*, 73 C176, appears at Appendix AA, page 27.

Appellants petitioned this Court for a Writ of Mandate or Prohibition in *Huffman et al v. The United States District Court for The Northern District of Ohio, Western Division et al*, No. 72-1613, which matter was docketed on June 1, 1973, and is presently pending before this Court. An application to Justice Potter Stewart for a Stay Order or Writ of Injunction was denied on June 12, 1973.

## THE QUESTIONS ARE SUBSTANTIAL

Appellants contend that the interference of the United States District Court for the Northern District of Ohio, Western Division, in the civil and criminal matters hereinabove recited, is an abuse of the federal process and disregards this Court's recent decisions on federal interference in criminal matters in *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed. 2d 669 (Feb. 23, 1971); *Samuels v. Mackell*, 401 U.S. 66, 91 S.Ct. 764, 27 L.Ed.2d 688 (Feb. 23, 1971); *Boyle v. Landry*, 401 U.S. 77, 91 S.Ct. 758, 27 L.Ed.2d 696 (Feb. 23, 1971); *Perez v. Ledesma*, 401 U.S. 82, 91 S.Ct. 674, 27 L.Ed.2d 701 (Feb. 23. 1971); *Dyson v. Stein*, 401 U.S.

200, 91 S.Ct. 769, 27 L.Ed.2d 781 (Feb. 23, 1971) and *Byrne v. Karalexis*, 401 U.S. 216, 91 S.Ct. 777, 27 L.Ed.2d 792 (Feb. 23, 1971), as further explicated for civil proceedings in *Mitchum v. Foster*, 407 U.S. 225, 32 L.Ed.2d 705, 92 S. Ct.__. As a direct result of such federal interference, the Cinema I Theatre at 69 Public Square, in Lima, Ohio, has been able to avoid the application of civil and criminal statutes, both substantive and procedural, and has thwarted the administration of due process of law in the State of Ohio for a period of more than a year.

The state procedures on enforcement of final judgments and appellate practice have been interferred with. Under Ohio Rules, the appellate process begins with the entry of a final judgment in the trial court, a fait accompli herein. To commence an appeal, a notice of appeal must be filed within 30 days after the entry of the final judgment. Ohio Rules of Appellate Procedure, rule 4(A) *Pursue, Ltd.* has elected not to appeal the state court judgment and the fact findings made by the trial court regarding the property interests *under which they claim* herein. Accordingly, under Ohio law, that final judgment represents the law of the case. *Independent of the question of the legal correctness of the federal court interference,* fact findings (2) and (3) of the Allen County Common Pleas Court, regarding the status of property at 69 Public Square, reading:

> "(2) That defendant, William H. Dakota, has engaged in a course of conduct of displaying motion picture films at said Cinema I Theatre which are obscene as (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value, all three elements coalescing.
>
> (3) That this conduct and the continuous exhibition of obscene motion picture films by the defendant constitutes a nuisance as defined by Section 3767.01 (c) of the Revised Ohio Code; . . . ."

which were not affected by such federal court interference, *are entitled to recognition.* But how shall the State of Ohio proceed to execute that portion of the final judgment which is not now subject to attack, so as to apply Ohio justice to the case of a declared violation of the law? Or for that matter, how may the State of Ohio perfect its trial court victory in such litigation, ie., the valid findings of the state court re the existence of a public nuisance, in either the state or the federal appellate systems? Where Pursue, Ltd. has refused to appeal from the final judgment of the Common Pleas Court, may petitioners do so in the state court? Clearly not, for the findings there were favorable! Further, on an appeal within the federal system, how may the State of Ohio preserve the Common Pleas Court's factual findings re the existence of a public nuisance, where the three-judge Federal District Court refused to consider such evidentiary matters in their disposition of the case!

The problem herein is *not* the same problem encountered in *Byrne v. Karalexis,* 396 U.S. 976, 24 L.Ed.2d 447, 90 S.Ct. 469 (Dec. 15, 1969), which this Court faced and solved by granting a stay of the temporary injunction issued by the United States District Court for the District of Massachusetts pending the timely filing and disposition of an appeal. The distinguishing factor in *Byrne v. Karalexis, supra,* can be seen from Justice Douglas statement of facts in his dissent at page 486:

> "Mr. Justice Douglas, dissenting.
>
> "Respondents are the owners and operators of a motion picture theatre which has been showing the film, "I Am Curious (Yellow)." On June 3, 1969, they were indicted by the Suffolk County Grand Jury for possessing with intent to exhibit an obscene film in violation of Mass Gen Laws, c 272, § 28A. On June 17, 1969, respondents brought an action in the United States District Court for the District of Massachusetts to enjoin future prosecutions for the showing of "I Am Curious (Yellow)" and to declare that prosecution and the Massachusetts statute unconstitutional. On June 24, 1969, the three-judge District Court enjoined the prosecution on the ground that the indictments did not allege

scienter. The indictments were then dismissed, and new indictments were thereafter returned. Respondent's request for a temporary injunction barring the second prosecution was denied by the District Court on July 15, 1969. The court stated that it would not consider a claim that the film was not obscene as an evidentiary matter, but invited the parties to submit briefs on the question whether the Massachusetts statute was unconstitutional on its face.

"Respondents were convicted of the state obscenity offense on November 12, 1969. The applicant in this proceeding, the District Attorney for Suffolk County, has not agreed that respondents may exhibit the film pending the appeal of their convictions. On November 19, 1969, applicant moved the District Court to abstain from deciding the constitutionality of the Massachusetts statute, pending the resolution of that issue in the state courts. On November 28, 1969, the District Court, by a 2-1 vote, denied the motion and authorized a temporary injunction enjoining applicant from interfering with respondents as respect future showings of the film, "I Am Curious (Yellow)," pending a final disposition by the merits.

"Applicant now requests this court to stay the temporary injunction which was issued by the District Court. *"The injunction issued by the District Court does not interfere in any way with the criminal conviction already obtained in the Massachusetts courts. That case will proceed unaffected by anything the federal court does, save for final execution of the state judgment. Dombrowski v. Pfister,* 380 US 479, 14 L Ed 2d 22, 85 S Ct 1116, is different. There we did not force petitioners to risk vindication of their constitutional rights in a state prosecution under an "overly broad" state statute. *Id.*, at 486, 14 L Ed 2d at 28. But in this case that risk was faced and resolution of the constitutional issues is being undertaken in the state courts. All that the fedderal court proposes is protection of respondents against repeated prosecutions, while both the state courts and

federal courts are resolving the constitutional issues. Enjoining one state prosecution, though perhaps permissible under Ex parte Young, 209 US 123, 52 L Ed 714, 28 S Ct 441, *would not be in keeping with more recent decisions. Douglas v. Jeannette*, 319 US 157, 87 L Ed 1324, 63 S Ct 877. But I read the sparse record before us differently from Mr. Justice Stewart and believe that we deal here with threats of repeated prosecutions; and those threats seem to me to be no less ominous to the federal constitutional regime than the threatened harassment of union leaders in *Hague v. CIO*, 307 US 496, 83 L Ed 1423, 59 S Ct 954, who were asserting First Amendment rights in explaining the purposes of the new National Labor Relations Act. See the opinion of Mr. Justice Roberts and Mr. Justice Black, id., at 504-506, 83 L Ed at 1430, 1431. *"There may in time be a collision between the two systems for us to resolve. Meanwhile I would let the two orderly processes go ahead. For I can imagine no better and smoother accommodation of the needs of the two regimes than that designed by the District Court.* (our emphasis.)

See also Justice Black's concurring opinion at page 489:

"In this case a Federal District Court *stepped into the middle of a pending state criminal prosecution, rendered an opinion in effect deciding the fundamental constitutional issue in the state case, and enjoined the initiation of new prosecutions of these defendants or the execution of any sentence imposed on them in the pending state case.* One of the fundamental aspects of our federal constitutional system requires that federal courts refrain from interfering in pending state criminal prosecutions except in highly unusual and very limited circumstances. I do not think the facts of this case present an occasion for departure from that general rule. It is for that reason alone that I agree with the Court's decision to stay the injunction issued by the Federal District Court against the State." (our emphasis)

By interfering with the final judgment herein, the three-judge Federal District Court has effectively "Stayed" the appellate proceedings in controvention of the policy expressed in 28 U.S.C. Section 2283, and has prevented the development of even Justice Douglas' "concurrent jurisdiction to collision." There is and can be no parallel appeal taking place within the state system. It would appear that the "collision" upon which Justice Douglas reflected, has already come to pass herein.[2] Under the laws enacted by the Ohio Legislature and the decisions rendered thereon by the Ohio judiciary, petitioners have a duty, and are about to enforce the final judgment of the Common Pleas Court of Allen County, Ohio, of November 30, 1972, as to which no appeal was perfected, which requires that the Cinema I Theatre be closed as a public nuisance, being a disorderly house which regularly exhibits obscene motion picture films as a course of conduct. Section 3767.05 defines that duty as follows:

> ". . . if the existence of a nuisance is established on the trial, a judgment shall be entered which shall perpetually enjoin the defendant and any other person from *further maintaining the nuisance. . . .*" (Our emphasis)

Section 3767.06 also provides, in part, as follows:

> ". . . if such innocence is established, such unsold personal property and contents shall be delivered to the owner, *otherwise it shall be sold,* as provided in this section. For removing and selling the personal property and contents, the officer shall be entitled to charge and receive the same fees as he would for levying upon and selling like property on execution; *and for closing the place and keeping it closed,* a reasonable sum shall be allowed by the court. . . ." (Our emphasis)

In carrying out those duties, appellants are placed upon the horns of a dilemma in that they are faced with the possibility of being held in contempt of the federal order of judgment herein which, if followed by appellants, would require them to be guilty of nonfeasance in the performance of their duties as state law enforcement officers.

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[2] See Chief Judge J. R. Brown's letter of Mar. 19, 1973, to Federal District Judge S. C. Pointer Jr. re this new problem at Appendix AA, pages 36-37.

I

PURSUE LTD. HAS FAILED TO STATE A CAUSE OF ACTION AS TO WHICH A FEDERAL COUPT HAS ORIGINAL JURISDICTION

(A) THE CONGRESSIONAL PURPOSE IN PASSING THE CIVIL RIGHTS ACT OF 1871 (42 USC SECT. 1983 AND 1985) WAS TO PREVENT RACIAL DISCRIMINATION. IT WAS THE INTENT OF CONGRESS AT THAT TIME THAT THOSE SECTIONS SHOULD NOT BE INTERPRETED AS A GENERAL FEDERAL TORT LAW AUTHORIZING INTERFERENCE WITH WHAT TRADITIONALLY ARE MATTERS FOR THE STATE COURTS. A PUBLIC NUISANCE LAWSUIT, BROUGHT BY A COUNTY PROSECUTOR, IS A CLASSIC EXAMPLE OF A LAWSUIT BELONGING TO THE LATTER GENRE OF CASES.

To make the Federal District Court a trial court for every case in which a pornographer raises a "free speech" defense reaches a result never intended by Congress when it enacted the 1871 Civil Rights legislation.

On the issue of whether Pursue Ltd. stated a cause of action under 42 USC Sect. 1985(3) (see page M-4), this court cannot avoid the implications of its rationale in *Griffin v. Breckenridge*, 403 U.S. 88, 29 L.Ed.2d 338, 91 S. Ct. 1790 (June 7, 1971), where, in upholding federal jurisdiction under the conspiracy section of the Civil Rights Act of 1871 in the case of conspiracies of private individuals to deprive the plaintiffs of civil rights involving racial discrimination, (43 USC Sect. 1985) Justice Stewart was required to examine the congressional purpose behind such legislation and concluded that *it was never the intent of Congress that the act should include conspiracies other than those showing some racial or perhaps otherwise class-based invidious discriminatory animus behind the conspirators' actions, at page 348:*

"It is thus evident that all indicators - text, companion provisions, the legislative history - point unwaveringly to

1985 (3)'s coverage of private conspiracies. That the statute was meant to reach private action does not, however, mean that it was intended to apply to all tortious, conspiratorial interferences with the rights of others. For, though the supporters of the legislation insisted on coverage of private conspiracies, *they were equally emphatic that they did not believe, in the words of Representative Cook, 'that Congress has a right to punish an assault and battery when committed by two or more persons within a State.'* Id. at 485. The constitutional shoals that would lie in the path of interpreting § 1985 (3) as a general federal tort law can be avoided by giving full effect to the congressional purpose - *by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment.* See the remarks of Representatives Willard and Shellabarger, quoted supra, at 100.29 L.Ed 2d, at 347. The language requiring intent to deprive of equal protection, or equal privileges and immunities, *means that there must be some racial, or perhaps otherwise class based, invidiously discriminatory animus behind the conspirators' action.* The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all." (Our emphasis)

Stewart grounded the 1971 decision upon three factors: (1) the plain language of 42 USC Sect. 1985; (2) *the statutory scheme of the 1871 Civil Rights Act, taken as a whole (42 USC Sect. 1983 and 1985) and (3) the legislative history of the Civil Rights legislation in 1871.* In examining the plain language of Section 1985, Stewart noted the failure to include the same phrase "under color of law," used in Section 1983, and remarked at page 345:

> "Indeed, the failure to mention any such requisite can be viewed as an important indication of Congressional intent to speak in Section 1985(3) of all deprivation of 'equal protection of the laws' and 'equal privileges and immunities under the law,' whatever the source."

Analysing the statute further, he examined the Civil Rights legislation *as a whole* (Sections 1983 and 1985) and noted

at page 346:

> "An element of the cause of action established by the first section, now 42 USC Sect. 1983, is that the deprivation complained of must have been inflicted under color of state law. *To read any such requirement into section 1983(3) would thus deprive that section of all independent effect. . . .Given the existence of these three provisions, it is almost impossible to believe that Congress intended, in the dissimilar language of that portion of section 1985(3) now before us, simply to duplicate the coverage of one or more of them...*" (our emphasis)

It seems logical that if Sections 1985 and 1983 are to be read together and if it was never the intent of Section 1985 to reach other than "racial, or perhaps otherwise class based, invidious discriminatory animus" then certainly the reach of Section 1983 is not so broad as to justify making the federal district courts the proper forum to litigate public nuisance lawsuits, lacking in racial or class based invidious discriminatory animus, wherein, as here a frivolous *defense* of "free speech" is raised.

This Court's ruling in *Mitchum v. Foster, supra*, does not hold that 42 U.S.C. Sect. 1983 embraces a civil rights action of the sort pleaded herein, i.e., against state officials for state action taken to abate as a public nuisance a business dealing in obscenity as a regular course of conduct. All that case decided was that the three-judge court below erred in its prefatory ruling in the abstract that the injunctive relief sought was unavailable since 28 U.S.C. Sect. 1983, under which that lawsuit was brought, was not an Act of Congress within the "expressly authorized" exception of the anti-injunction statute which would authorize a federal court to grant injunctive relief and stay proceedings in a state court. Nor did this Court consider in *Mitchum, supra*, whether the plaintiff in that action, did, in fact, state a cause of action under 42 U.S.C. Sect. 1983. See *Farrell v. Joel, Jr.*, 437 F.2d 160 (2nd Circuit, January 20, 1971), a civil rights case based upon 42 U.S.C. Sect. 1983 to review school administration practice, where Circuit Judge Feinberg, speaking for the 2nd

Circuit (Lumbard, Feinberg, Clarie) noted at page 162:

> "Appellant assumes that his complaint states a viable action under the Civil Rights Act, 42 U.S.C. Sect. 1983, and its jurisdictional counterpart 28 U.S.C. Sect. 1343(3). *It is a measure of the change in the law over the past decade that the defendants and the district court did not question this assumption* . . . ." (Our emphasis.)

When this Court does undertake to decide this basic question, it must weigh in the balance this Court's past difficulties with federal interference in the obscenity and other areas of traditional state court activity during the past three terms of court, which culminated in its rulings restricting federal interference in *Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 288, 26 L.Ed.2d 234, 90 S.Ct. 1739 (June 8, 1970), during the 1969 October Term and in *Younger v. Harris, supra; Samuels v. Mackell, supra; Boyle v. Landry, supra; Perez v. Ledesma, supra; Dyson v. Stein, supra; and Byrne v. Karalexis, supra*, during the 1970 October Term. Appellants herein submit that any expansion of federal jurisdiction along the lines undertaken by the United States District Court for the Northern District of Ohio, Western Division, herein, will bring further chaos to obscenity litigation, will severely damage the state-federal court balance, and will further load this Court's docket.

(B) ASSUMING THAT, IN THEORY, A CAUSE OF ACTION CAN BE STATED UNDER 42 U.S.C. SECT. 1983 OF THE CIVIL RIGHTS ACT, BASED UPON LEGAL ACTION TAKEN BY A COUNTY PROSECUTOR TO ABATE A PLACE AND CONDUCT WHICH AMOUNTS TO A PUBLIC NUISANCE, STILL THE FACTS ALLEGED IN *PURSUE, LTD. v HUFFMAN*, C72-432, ON THEIR FACE, FAIL TO PLEAD SUCH A CAUSE OF ACTION AND FOR THAT REASON ALONE THE DISTRICT COURT SHOULD HAVE DISMISSED THE CASE.

(1) Highly specific facts must be pleaded in the complaint.

It is often said that in an action under Section 1983, the plaintiff must allege highly specific facts. It is not enough to state conclusory allegations without support of the facts alleged. Complaints have been dismissed where the allegations were broad, conclusory and unsupported by factual allegations. Federal Civil Rights Acts by C. J. Antieau, section 83 at page 108. Common sense dictates that in a case such as this, where the state court complaint is highly specific as to the nature of the conduct complained against, see point V (C), infra, that a federal complaint alleging violations of sections 1983 and 1985 must reply to the questioned conduct with equal specificity, in order to avoid a motion to dismiss.

(2) In examining the sufficiency of the Federal Complaint, the court below erred in failing to consider appellee's course of conduct which was alleged and proved in the State court trial.

The federal district court erred, in its ruling as to whether a cause of action had been stated, in failing to take into account the fact that the state trial involved the trial court's examination of appellee's course of conduct extending over several months, and its examination of 16 motion picture films which had been exhibited at the theatre during that period of time, which films such court ruled were obscene under specific state standards as to what the term "obscene" legally encompassed. Paralleling the question as to whether a three-judge court should be impaneled and the jurisdictional requirement that a substantial federal question be raised as to the constitutionality of the state statute, *Idlewild Bon Voyage Liquor Corp. v. Epstein* 370 U.S. 713, 8LEd. 2d. 794, 796, 82 S.Ct. 1294 (June 25, 1962), (infra, at page 43) is the question for the trial court as to whether the constitutional question posed has application to the situation

under litigation. In other words, a court will not litigate legal rights in the abstract. *United States v. Raines*, 362 U.S. 17, 4 L.Ed.2d 524, 80 S.Ct. 519 (Feb. 29, 1960). The *Raines* case concerned an action by the United States against members of the Board of Registrars and others of Terrell County, Georgia, under the Civil Rights Act of 1957, 42 U.S.C., § 1971. The United States District Court held 42 U.S.C. § 1971 (c) unconstitutional and dismissed the complaint. In reversing that court, the Supreme Court (Justice Brennan speaking for seven members, Frankfurter and Harlan concurring) held at page 529 that this Court, as is the case with all federal courts:

> ". . . 'has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constiiution, except as it is called upon to adjudge the legal rights of the litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied . . . .' Kindred to these rules is the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional . . . ."

## II

### (A) THE COMPLAINT HEREIN FAILED TO SUPPLY A BASIS FOR EQUITABLE JURISDICTION AND FEDERAL INTERVENTION.

The equitable principles which govern interference by federal courts in criminal and civil proceedings pending in state courts were laid down by this Court in *Younger v. Harris*, 401 U.S. 37, 27 L.Ed.2d 669, 91 S.Ct. 746 (Feb. 23, 1971),

and *Mitchum v. Foster*, 407 U.S. 225, 32 L.Ed.2d 705, 92 S.Ct. ____ (June 19, 1972).

In *Younger v. Harris, supra,* this Court established the equitable principles which are to govern interference by federal courts in pending *criminal* matters. There it was held that it would take "exceptional circumstances" to warrant a federal court's enjoining state proceedings where a state prosecution was already pending at the time the federal action was filed; that in general, the plaintiff *must allege and prove* not only "irreparable injury," the traditional prerequisite for injunctive relief, but in addition, that the danger of irreparable injury is both "great and immediate," which normally requires that plaintiff show bad faith and an intention to harrass on the part of the prosecuting officials, as was established by the pleadings in *Dombrowski v. Pfister, 380* U.S. 479, 14 L.Ed.2d 22, 85 S.Ct. 1116 (1965); further, that where the prosecution is undertaken in good faith, and not for purposes of harrassment, a federal court may not properly enjoin enforcement of a statute solely on the basis of a showing that the statute "on its face" abridged First Amendment rights, absent "extraordinary circumstances." In *Samuels v. Mackell*, 401 U.S. 66, 27 L.Ed.2d 688, 91 S.Ct. 764 (Feb. 23; 1971), those same standards were adopted where the federal relief sought in such situations was the issuance of a declaratory judgment.

In *Mitchum v. Foster, supra,* this Court was faced with a fact situation involving abatement proceedings brought under the civil law, - similar to the proceedings herein. While that decision dealt with a collateral issue, the majority opinion did observe that the above equitable principles regulating interference in criminal cases expressed in *Younger, supra,* also restrained interference by a federal court in civil cases pending in state courts, at page 718.

> ". . . we do not question or qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding. These principles, in the context of state criminal prosecutions, were canvassed at length last Term in Younger v. Harris . . . ."

The facts as pleaded in the complaint show: (1) That the statute under which the civil action was brought had been upheld, *pro tanto*, against a broad attack on the statute, by a three-judge Federal District Court in the same district wherein the federal relief was sought, *Grove Press, Inc. v. Flask*, 326 F. Supp 574 (Mar. 10, 1970), vacated and remanded on other grounds in *Grove Press, Inc. v. Flask* ___ U.S. ____(June 21, 1973) and (2) that the civil action was brought by petitioner as the prosecuting attorney for Allen County under the compulsion of O.R.C. Section 3767.03, and (3) that the judgments of the state trial court on the issue of "public nuisance" were favorable to the petitioner in the hearings on both the preliminary injunction, entered October 24, 1972, and on the final injunction, entered November 30, 1972, both of which determinations were alleged on the face of the complaint. Appellants submit that a finding that the pleadings herein raised issues of "bad faith" and "harrassment" would be reversible error.

The inescapable conclusion to be drawn from the principles expressed in *Younger* and *Mitchum* and the complaint on file herein is that a case for federal relief by way of equitable interference could only be made out by urging that two elements of proof are capable of being established: (1) That the statute on its face abridges First Amendment rights, and (2) that "extraordinary circumstances" exist; yet neither are present. The alternate proof of "danger of irreparable injury being great and immediate" is unavailable where, from the facts pleaded in the complaint it must be held, as a matter of law, that petitioners acted in good faith and not for purposes of harrassment.

An examination of O.R.C. Section 3767 et seq show it to be constitutional on its face. *Grove Press, Inc. v. Flask, supra*. A civil statute requiring a forfeiture for a period of one year of the leasehold interest in the property used in conducting or maintaining a public nuisance, as a civil penalty, after trial on the merits and a finding by the trial court that a public nusiance exists, is entirely constitutional. *U.S. v. U.S. Coin and Currency. One Lot of Emerald Cut Stones and One Ring v. U.S.*, 409 U.S. 232, 34 L.Ed.2d 438, 93 S.Ct. 489

(Dec. 11, 1972). See Point VI (A) at page 61 entitled "The error in the federal court's logic.

Though not considered by the federal court in its decision, the proof before the federal court demolished all claims of "extraordinary circumstances"; i.e., as noted in the three-judge Federal District Court's opinion (Appendix A, page 10), the state trial court's finding of a public nuisance in *State of Ohio ex rel Huffman v. Dakota*, 72 CIV 0326, was based upon an examination of 16 motion picture films by the Allen County Common Pleas Court, the obscene nature of which was specially pleaded and apparent upon the face of the complaint on file in the state court, which pleadings had been removed to the federal court on December 11, 1972. Further, the federal court had before it evidence in the form of affidavits appended to the trial brief filed on January 16, 1973 (see Statement of Facts, page 16 and Appendix N, pages 3-11) and appended to the Motion to Dismiss filed on February 12, 1973 (see Statement of Facts, page 19 and Appendix P, pages 2-39, Appendix Q, pages 2-41, and Appendix R, pages 3-51) which established, as a matter of law, that *Pursue, Ltd.* was still maintaining the public nuisance at the time of the federal court hearing on March 12, 1973.

Further, in its prayer for equitable relief, Pursue Ltd. is challenged by the ancient maxim of equity that a "man must come into a court of equity with clean hands." *Eyre, C.B. Dearing v. Earl of Winchelsea* (1787); Cox Eq. 318, 319. On this matter Federal District Judge Cox, speaking for the three-judge court (2-1) in *Irene McGrew, et al. v. City of Jackson, Mississippi*, 307 F. Supp. 754 (Dec. 31, 1969), said the following at page 765:

> "None of these plaintiffs have any standing in this court under the clean hands doctrine to successfully seek a recovery of that film. /10"

At footnote 10 of Judge Cox's opinion are cited excerpts from one Supreme Court decision and two Circuit Court of Appeals decision:

> "10. Precision Instrument Mfg. Co. et al. v. Automotive Machinery Co., 65 S.Ct. 993 provides:

" 'The guiding doctrine in this case is the equitable maxim that "he who comes into equity must come with clean hands." This maxim is far more than a mere banality. It is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant. That doctrine is rooted in the historical concept of court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith. This presupposes a refusal on its part to be "the abetter of iniquity." Bein v. Heath, 6 How. 228, 247, 12 L.Ed. 416. Thus while "equity does not demand that its suitors shall have led blameless lives," Loughren v. Loughren, 292 U.S. 216, 229, 54 S.Ct. 684, 689, 7 L.Ed. 1219, as to other matters, it does require that they shall have acted fairly and without fraud or deceit as to the controversy in issue. Keystone Driller Co. v. General Excavator Co., 290 U.S. 240, 245, 54 S.Ct. 146, 147, 78 L.Ed. 293; Johnson v. Yellow Cab Transit Co., 321 U.S. 383, 387, 64 S.Ct. 622, 624, 88 L.Ed. 814; 2 Pomeroy, Equity Jurisprudence (5th Ed.) § 397-399. This maxim necessarily gives wide range to the equity court's use of discretion in refusing to aid the unclean litigant. It is "not bound by formula or restrained by any limitation that tends to trammel the free and just exercise of discretion." Keystone Driller Co. v. General Excavator Co., supra, 290 U.S. 245, 246, 54 S.Ct. 147, 148, 78 L.Ed. 293. Accordingly, one's misconduct need not necessarily have been of such a nature as to be punishable as a crime or as to justify legal proceedings of any character. Any willful act concerning the cause of action which rightfully can be said to transgress equitable standards of conduct is sufficient cause for the invocation of the maxim by the chancellor. Moreover, where a suit in equity concerns the public interest as well as the private interests of the litigants, this doctrine assumes even wider and more significant proportions. For if an equity court

properly uses the maxim to withhold its assistance in such a case it not only prevents a wrongdoer from enjoying the fruits of his transgression but averts an injury to the public. The determination of when the maxim should be applied to bar this type of suit thus becomes of vital significance. See Morton Salt Co. v. G. S. Suppiger Co., 314 U.S. 488, 492-494, 788 (sic), 62 S. Ct. 402, 405, 406, 86 L.Ed. 363.

"To the same effect is Karl E. Stiegele and Speidel Corp. vs. J. M. Moore Import-Export Co., Inc., (2CA) 312 F.2d 588.

"New York Football Giants, Inc. v. Los Angeles Chargers Football Club, Inc. (5CA) 291 F.2d 471, the court said:

" 'Without considering the legal issues on the merits, we affirm the judgment of the trial court. We do so by application of the age-old, but sometimes overlooked, doctrine that "he who comes into equity must come with clean hands." '

"Earle R. Hanson & Associates v. Farmers Cooperative Creamery Company of Clear Lake, Wisconsin, (8CA) 403 F.2d 65, provides:

" 'The misconduct need not be of such a nature as to be actually fraudulent or constitute a basis for legal action. The plaintiff may be denied relief where his conduct has been unconscionable by reason of a bad motive, or where the result induced by his conduct will be unconscionable either in the benefit to himself or the injury to others. Johnson v. Freberg, 178 Minn. 594, 228 N.W. 159, 160 (1929). Cf Precision Inst. Mfg. Co. v. Automotive Maintenance Mach. Co., 324 U.S. 806, 815, 65 S.Ct. 993, 89 L.Ed. 1381 (1945); Pope Mfg. Co. v. Gormully & Jeffrey Mfg. Co., 144 U.S. 224, 236-237 12 S.Ct. 643, 36 L.Ed. 426 (1892); Kool Vent Metal Awning Corp. of America v. Bottom, 205 F.2d 209 (8 Cir. 1953).' "

For the above reasons the complaint in *Pursue, Ltd. v. Huffman*, C72-432, fails to state a cause of action upon which

equitable relief may be granted. See Memorandum in Support of Motions to Dismiss and Dissolve Temporary Restraining Order at Appendix O, pages 4-7; Appendix P, pages 1-39; Appendix Q, pages 1-41; and Appendix R, pages 1-51; and Complaint in *State of Ohio ex rel Lawrence S. Huffman v. William H. Dakota*, 72 CIV 0326, at Appendix C, pages 3-13.

**(1) The Three-Judge Court was improperly invoked.**

By order dated December 11, 1972, the Sixth Circuit Court of Appeals designated a three-judge district court to consider the constitutional claims of Pursue, Ltd. (See Appendix L, pages 18-19.) In that designation, the Court of Appeals stated:

> "This designation and composition of the three-judge court is not a prejudgment, express or implied, as to whether this is properly a case for a three-judge rather than a one-judge court. This is a matter best determined by the three-judge court. . . ."

Under this Court's rulings in *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713, 8 L.Ed.2d 794, 796, 82 S.Ct. 1294 (June 25, 1962), the case should have been dismissed by the three-judge court for failure to raise a substantial federal question.

The constitutionality of O.R.C. Sections 3767 et seq. depends upon a pragmatic assessment of its operation in the particular circumstances. In *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 1 L.Ed. 2d 1469, 77 S.Ct. 1325 (June 24, 1957) this Court in dealing with a like situation held at page 1474:

> "The judicial angle of vision in testing the validity of a statute like § 22-a is 'the operation and effect of the statute in substance. . . .' The phrase 'prior restraint' is not a self-wielding sword. Nor can it serve as a talismanic test. The duty of closer analysis and critical judgment in applying the thought behind the phrase has thus been authoritatively put by one who brings weighty learning to his support of constitutionally protected liberties. 'What is needed ' writes Professor Paul A. Freund, *'is a pragmatic assessment of its operation*

*in the particular circumstances.* The generalization that prior restraint is particularly obnoxious in civil liberties cases must yield to a more particularistic analysis.' The Supreme Court and Civil Liberties, 4 Vand. L. Rev. 533, 539 - 354 U.S. 441, 442 (emphasis added.)" Appellant submits that where specific pleadings demonstrate on their face that a party is dealing in obscenity per se, it is plain error to rule that a substantial federal question is raised for the invocation of a three-judge court. See *Paris Adult Theater v. Slaton*, No. 71-1051, slip opinion at page 6; *Kaplan v. California*, No. 71-1422, slip opinion at page 7; *Womack v. U.S.* 294Fd. 204 Jan. 12, 1961), cert denied in 365 U.S. 859, 81 S.Ct. 826, 5L.Ed. 2d 822 (Mar. 27, 1961). See also Point I (B) 2, supra, at page 36 and *Miller v. Reddin*, 293 F Supp. 216, at 229 (Nov. 18, 1968) wherein Federal District Judge Hauk, after examining the materials there involved, held that jurisdiction did not lie in a three-judge court, the court saying:

"As such, each of the five books is clearly, unequivacally and uncontrovertibly obscene and pornographic in the hard core sense, and reasonably comes within the ambit and purview of the obscenity statute. . . "Thus it is impossible for the court to find any substantial federal question. . . ."

## III

## UNDER THE DOCTRINE OF LIS PENDENS, PURSUE LTD. LACKED STANDING TO PROSECUTE THE CIVIL RIGHTS ACTION ALLEGED IN *PURSUE LTD. V. HUFFMAN ET AL 72C432.*

On November 17, 1972, the date that Pursue, Ltd. acquired from William Dakota its leasehold interest in Cinema I at 69 Public Square, Lima, Ohio, a civil proceedings *in rem* to determine the status of property at that address (whether it was a public nuisance) entitled, *Ohio ex rel Huffman v. Dakota*, 72 CIV 0326, was on file in Allen County Common

Pleas Court and all parties in that action had been served (see Statement of Facts, pages 7-9). The complaint described by metes and bounds and by street address said premises and named the owners thereof (Appendix C, pages 4-5). Actual notice of such state lawsuit was given to Pursue, Ltd. on November 22, 1972, through service on Robert Hollis, the president of Pursue, Ltd. (see Statement of Facts at page 12, and application for license at Appendix AA). Further, Pursue, Ltd. was formed as a corporation by the attorneys for William Dakota in the state action for what would appear to be the specific purpose of taking an assignment of the property from Dakota in an attempt to avoid the consequences flowing from the adverse state court ruling (see Statement of Facts, page 25; and Articles of Incorporation for Pursue, Ltd. at Appendix AA, pages 3 to 6). Pursue, Ltd. had actual knowledge of the final judgment of November 30, 1972, in the state court action, forfeiting the leasehold interest (for a year) of William Dakota, Pursue, Ltd.'s, Assignor, prior to its filing of the federal action, having alleged that fact in its complaint (see Appendix J, at page 7).

In order that there may be a valid and effective *lis pendens*, four elements must be present: (1) The property must be of a character to be subject to the rule; (2) the Court must have jurisdiction both of the person and the *res;* (3) the property or *res* involved must be sufficiently described in the pleadings; and (4) the litigation must be about some specific thing that must be necessarily affected by the termination of the suit.

The Ohio Statute on *lis pendens*, O.R.C. Section 2703.26, provides that when summons has been served or publication made, the action is pending so as to charge third persons with notice of its pendency. While pending, no interest can be acquired by third persons in the subject of the action, as against the plaintiff's title. This statute is simply declaratory of the Common Law doctrine of *lis pendens*, and is to be construed with reference to the Common Law rules in respect of the doctrine. 34 Ohio Jurisprudence 2d, Lis Pendens, page 685. In interpreting this statute, the Ohio Supreme Court has indicated that the doctrine is not based, or at least does not rest primarily, on any doctrine of notice, but rests upon

public policy and necessity. In other words, it may be said that the doctrine rests upon the power the court acquires over the property in *litis pendence*, and cannot have its functions frustrated by dealings *inter parties* with the *res* during litigation. Suits might be interminable, and judgments without fruits, if one litigant could impose upon an opposing litigant the necessity of making new parties as often as he chose to convey property involved in the suit. 34 Ohio Jurisprudence 2d, Lis Pendens, page 687. While the general rule is that a judgment or decree binds only parties and those in privity with them, and is not conclusive as against strangers to the action, yet, according to the doctrine of *lis pendens*, one who acquires an interest in property which is at that time involved in litigation in a court having jurisdiction of the subject matter and of the person of the one from whom the interests are acquired takes subject to the judgment or decree, and is as conclusively bound by the result of the litigation as if he had been a party thereto from the outset. This is so irrespective of whether he has been made a party to the proceedings, or had actual notice of the pendency of the proceeding, and even where there was no possibility of his having had notice of the pendency of the litigation. 34 Ohio Jurisprudence 2d Lis Pendens, page 684.

Under the Statement of Facts, noted above, and the doctrine of *lis pendens*, the final judgment of the Allen County Common Pleas Court in *Ohio ex rel Huffman v. William Dakota*, 72 CIV 0326, on November 30, 1972, forfeiting the leasehold interest of William Dakota, operated to divest Pursue, Ltd. of such interest in the property.

IV

UNDER THE MANDITORY PROVISIONS OF 28 USC SECTION 2283, THE U. S. DISTRICT COURT LACKED JURISDICTION TO ENJOIN THE PROCEEDINGS IN THE STATE COURT.

(A) THE FEDERAL COURT LACKED JURISDICTION OVER THE REAL ESTATE WHICH, AT THAT TIME, WAS IN CUSTODIA LEX IN THE STATE COURT PROCEEDINGS.

The federal court lacked jurisdiction over the subject real estate which at that time was in *custodia lex* in the state court *in rem* proceedings in *Ohio ex rel Huffman v. Dakota*, 72 CIV 0326. The federal court failed to recognize that the state court civil action brought under Ohio Revised Code, Section 3767 *et seq.* was both an *in personam* and an *in rem* action[3] - *in personam*, in so far as the defendants, who were before the court, might be enjoined by the court's rulings, and *in rem*, in that the status of the property was also to be determined by the court. In *Toucey v. New York Life Insurance Co.*, 314 U.S. 118, 62 S.Ct. 139, 86 L.Ed. 100 (1941), Justice Frankfurter stated the principle as:

> "Third. This brings us to applications of Section 265 apart from these statutory qualifications. The early decisions of this Court applied the Act of 1793 as a matter of course. However, a line of cases beginning with Hagan v. Lucas, 10 Pet. 400, 9 L.Ed. 470, holds that the court, whether federal or state, which first takes possession of a res withdraws the property from the reach of the other. Taylor v. Carryl, 20 How. 583, 597, 15 L.Ed. 1028; Freeman v. Howe, 24 How. 450, 16 L.Ed. 749. See Kline v. Burke Construction Co., 260 U.S. 226, 235, 43 S.Ct. 79, 83, 67 L.Ed. 226, 24 ALR 1077: 'The rank and authority of the (federal and state) courts are equal, but both courts cannot possess or control the same thing at the same time, and any attempt to do so would result in unseemly conflict. The rule, therefore, that the court first acquiring

[3] See, however, the court's remarks on "standing" at footnote 1 (Appendix A, page 5).

> jurisdiction shall proceed without interference from a court of the other jurisdiction is a rule of right and of law based upon necessity, and where the necessity, actual or potential, does not exist the rule does not apply. Since that necessity does exist in actions in rem and does not exist in actions in personam, involving a question of personal liability only, the rule applies in the former but does not apply in the latter.' "

See also *Penn General Casualty Co. v. Pennsylvania*, 294 U.S. 189 (1935), and *Princess Lida of Thurn and Taxis v. Thompson*, 305 U.S. 456 (1939), and the cases cited therein. See also the historical discussion of *Toucey v. New York Life Ins. Co., supra*, in *Mitchum v. Foster, supra*, at 714.

> ". . . The congressional response to Toucey was the enactment in 1948 of the anti-injunction statute in its present form in 28 USC Sect. 2283. . . to 'restore the basic law as generally understood and interpreted prior to the Toucey decision. . .' "

The infirmities noted above, being apparent on the face of the complaint as filed, the federal court should have dismissed the federal action for lack of jurisdiction.

(B) A FEDERAL COURT HAS NO POWER TO INTERFERE WITH STATE APPELLATE PROCEEDINGS. IT MAY NOT STAY PROCEEDINGS IN A STATE COURT AFTER A FINAL JUDGMENT HAS BEEN ENTERED IN THE STATE ACTION.

Appellants know of no authority which permits the removal of a state case after final judgment. To countenance that procedure would interfere with the state appellate processes which commence upon the entry of the final judgment. On this point, see also the personal letter of Chief Judge John R. Brown of the Fifth Circuit Court of Appeals, dated Mar 19, 1973, to Federal District Judge Sam Pointer Jr., regarding the propriety of federal interference after a final judgment in an Alabama motion picture theatre abatement case, identical to the case herein, wherein three theatres were abated as public nuisances (See Appendix AA, page 36). A copy of the

final decree and writ of injunction in one of those cases entitled *State of Alabama ex rel Sweeton v. First Amendment Foundation Inc. et al*, in the Circuit Court of Madison County, dated Feb. 23, 1973, appears at Appendix AA, pages 28-31. The opinion and order of Federal District Judge Sam Pointer Jr. in the Alabama cases appears at Appendix AA, pages 32-35. Appellants would point out that Judge Pointer's decision recognized the distinction between the "in personam" and "in rem" aspects of the Alabama Public Nuisance Statute and State judgment in the abatement action, discussed hereinafter at Point VI and permitted the state "in rem" closure order to stand undisturbed.

(1) Jurisdiction over the real estate could only be acquired by removing the entire Common Pleas action to the Federal District Court. Such is not authorized by the removal statutes.

To acquire jurisdiction of the *res* under the circumstances herein prevailing, it would have been necessary to remove the entire state action to the federal court in a removal action authorized by 28 USC Sect. 1441 or 1443. The removal action in *State of Ohio ex rel Huffman v. Dakota*, however, was not filed until Dec. 11, 1972, at which time the Allen County Common Pleas Court had already handed down its final judgment of Nov. 30, 1972 on the matter.

On Nov. 30, 1972, the Allen County Common Pleas Court entered a permanent injunction in State of Ohio ex rel *Huffman v. Dakota*, C72-0326, (see page 13 and Appendix I, pages 2-4). On Dec. 11, 1972, Robert Hollis, President of Pursue Ltd., as successor to the interest of William Dakota, filed a petition for removal in the federal district court entitled *Dakota v. State of Ohio ex rel. Huffman*, C-73-176, (see page 15 and Appendix L, pages 3-12), effecting its removal from the state court. On April 26, 1973, respondent three judge federal district court, sua sponte, entered an order of judgment, dismissing the case as moot (see page 21 and Appendix S page 3).

The case was improperly removed: The federal court did not have removal jurisdiction to act upon the case, and the case should be remanded. See Appendix L at pages 10-14.

A civil action to abate a public nuisance is not a "civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution etc. . . .", as that phrase is employed in 28 USC sect. 1441(b), so as to satisfy the test for removal jurisdiction. Quite the contrary, the public nuisance cause of action is one in which state courts traditionally have original jurisdiction, and is founded upon a claim arising under the sovereign power of the state to safeguard state interests. *Grove Press Inc. v. City of Philadelphia* 300 F Supp 281 at 292. The fact that a first amendment claim may be raised in defense thereto does not satisfy the requirements of the removal statute. *Gully v. First National Bank*, 299 US 109 (Nov. 9, 1936)

Appellees arguments that they, as film exhibitors, cannot enforce their first amendment rights as citizens of the United States to freedom of speech and the press in the Court of Common Pleas of Allen County, Ohio and thus qualify for removal jurisdiction under 28 USC sect. 1443(1) is answered in *Georgia v. Rachel* 384 US 780, 791 (1966):

> ". . . the phrase 'any law providing for . . . equal civil rights' must be construed to mean any law providing for specific civil rights stated in terms of racial equality. Thus the defendants' broad contentions under the First Amendment and the Due Process Clause of the Fourteenth Amendment cannot support a valid claim for removal under Section 1443 . . . "

V

THE OHIO OBSCENITY STATUTE, AS CONSTRUED BY THE OHIO JUDICIARY, AND AS APPLIED BY THE TRIAL JUDGE, COMPLIES WITH THE SPECIFICITY REQUIREMENT ENUNCIATED BY THIS COURT IN *MILLER V. CALIFORNIA* DECIDED JUNE 21, 1973.

The Allen County nuisance abatement action in *State of Ohio ex rel Huffman v. Dakota*, 72 CIV 0326 was filed on Sept. 18, 1972. Long before that time, the Ohio judiciary had construed the obscenity laws of the State of Ohio in a manner which rendered the word "obscene", specific. See *City of Youngstown, Ohio v. De Loreto*, 251 N.E.2d 491 at 500, 48 Ohio Op. 2d 393 (Sept. 10, 1969); State of Ohio ex *rel. Ewing v. Without a Stitch*, 57 Ohio Op. 2d 184 at the footnote on page 187 (July 9, 1971); and *State of Ohio ex rel. Keating v. Vixen*, 272 N.E.2d 137 at 141, 142, 27 Ohio St. 2d 278 (July 21, 1971).

Further, the Ohio legislature had already enacted specific legislation (effective Sept. 15, 1970) of the type which was exemplified by this court in *California v. Miller*___*U.S.*___ LEd.2d___93 S.Ct. 2607 (June 21, 1973), and which this court wrote into the federal statutes as a federal standard in *U.S. v. 12-200 ft. Reels of Super 8MM Film*___U.S. ____ LEd.2d ____, 93 S.Ct. 2665.

**(A) The Ohio Judiciary, Through Decisional Law, Has Engrafted Specific Standards Onto the Term "Obscene" as Used in the Ohio Obscenity Laws.**

*The common standards of right and wrong embodied in the criminal statutes of Ohio dealing with sexual morality have, by judicial construction, been subsumed in the term "obscene" as used in the obscenity statutes.* If such depictions are accompanied with the same "mens rea" which defines an offense under the criminal statutes, such also is in violation of the specific standards prescribed by the term

"obscene". In *De Loreto, supra*, the Court in examining several sex magazines on appeal, enumerated the state statutes and city ordinances which prohibited immoral conduct. From that the Court deduced what the moral standards of Ohio people on sex were, at page 500:

*"The moral standards of the people in Ohio on sex are readily ascertainable because of the statutes that have been enacted on the subject. Youngstown has similar ordinances to the statutes of the state of Ohio.*

**OHIO LAWS INDICATING SEX MORAL STANDARDS**

"Laws of Ohio and the city of Youngstown relating to sex, which indicated the moral standards of the people of Ohio, prohibit the following:

"1. Adultery or fornication. Section 2905.08, Revised Code. Youngstown City Ordinance 132.03.

"2. Prostitution. Sections 2905.14 and 2905-27, Revised Code. Youngstown City Ordinance Sections 132.01, 132.04 and 132.06.

"3. Any person eighteen years of age or over wilfully making an indecent exposure of his person in a place or in a place where there are other persons to be offended or annoyed thereby, or solicit another to engage in an act of sex perversion. Section 2905.30, Revised Code. Youngstown City Ordinance 132.11.

"4. Any person eighteen years of age or over wilfully exposing his or her private parts in the presence of two or more persons of the opposite sex. "Private Parts" means the external genitalia of the human body. Section 2905.31, Revised Code.

"5. Sodomy, Section 2905.44, Revised Code.

**MORAL STANDARDS OF OHIO PEOPLE ON SEX**

"Thus, the laws of Ohio and the City of Youngstown prohibit extra-marital sexual relations, as offensive to the moral standards of the people of Ohio. Nudity to the ex-

tent of exposing the external genitalia of a male or female human body is also prohibited as likely to incite or encourage extra-marital sexual relations.

"We hold that one of the purposes of Section 2905.34, Revised Code, and of Youngstown City Ordinance Section 132.09(a), is directed at obscene publications that are likely to incite or encourage sexual conduct contrary to the moral standards of the people of Ohio." (Our emphasis.)

Hamilton County Common Pleas Judge Leis, in his trial court opinion in *Ohio ex rel. Keating v. Vixen*, dated November 17, 1969, applied the same rationale in his evaluation of the contemporary standards of the community. See Appellants' Statement as to Jurisdiction in *"A Motion Picture Film Entitled "Vixen" et al v. State of Ohio, ex rel Keating*, No. 71-599 at page 13a.

"The Court, under its prerogative to believe or disbelieve, or accept all or part, or none of the testimony and evidence presented, is of the opinion that such testimony does not reflect the true feeling and acceptability by the community of 'Vixen' type of film. First of all, acceptability by an audience is not the true criteria of the measurement of the community standard, and acceptance of a film by the community, because the attending audience is but a segment of the community, and I might say a very small segment of the Community.

*"A proper criteria for evaluation of the contemporary standard of the community is its establishment and enforcement of laws governing the conduct of its citizenry. A simple reference in the Ohio Revised Code sets forth the moral standards of the people of Ohio, including this community, on sex matters. These laws are enforced in this community, and include:*

Adultery or Fornication - Section 2905.08 O.R.C.

Prostitution - Section 2905.10 O.R.C.

Indecent Exposure - Section 2905.30 O.R.C.

Solicitation of Unnatural Sex Act - Section 2905.30

O.R.C.

Nudism - Section 2905.31 O.R.C.

Incest - Section 2905.07 O.R.C.

Rape - Section 2905.01 (etc.) O.R.C.

Sodomy - Section 2905.44 O.R.C.

*"These laws as well as local ordinances set forth the moral standard of the community*, and under proper presentation, they are enforced.

"In the case of *Trans Lux Distributing Corp. v. Board of Regents* (248 NYS 2d 857), Judge Burke states 'It is my view that a filmed presentation of sexual intercourse, whether real or simulated, is just as subject to state prohibition as similar conduct if engaged in on the street.'

"The community does not allow, or condone, fornication on the street corner, or any public display of nakedness. Bare bosom women are not permitted to walk the streets. If this happens, prosecution follows. *If the community does not accept (and permit) public display of sex acts and nakedness on its streets and in public places, can it be said that a movie displaying such conduct meets the standards of the community? Definitely not."* (Our emphasis.)

Lucas County Common Pleas Judge Nicholas J. Walinski arrived at the same result in his Findings of Fact and Conclusions of Law handed down in *State of Ohio ex rel. Ewing v. Without A Stitch*, on September 15, 1970

"Finding of Fact . . .

"10. That acceptability by a movie audience is not the true criteria of the measurement of community standards relating to the representation of sexual matters or acceptance of a movie by the community because the attending audience, as in this case, is a very small segment of the community. *The proper criteria for a valuation of contemporary standards of the community relating to the representation of sexual matters must necessarily be the enacting and enforcement of laws by that community governing*

*the conduct of citizenry; that simple reference to the Ohio Revised Code sets forth the legal moral standards of the people of Ohio, including Lucas County, on sex matters and that there is generally* attempted enforcement in this community. These Sections include, but are not limited to the following:

Sec. 2905.08 O.R.C., Adultery or Fornication
Sec. 2905.10 O.R.C., Prostitution
Sec. 2905.30 O.R.C., Indecent Exposure
Sec. 2905.30 O.R.C., Soliciation of Unnatural Sex Act
Sec. 2905.31 O.R.C., Nuqism
Sec. 2905.44 O.R.C., Sodomy

There are existing similar statutes in the majority of states, giving an inference of national community standards." (Our emphasis.)

In affirming the decision of Judge Walinski, the Court of Appeals of Lucas County noted in *State ex rel. Ewing v. Without A Stitch*, 57 Ohio Op. 2d 184 at 187 (July 9, 1971):

*"We have also considered as indicative but not conclusive of national standards of laws of the State of Ohio* and other states.* See Roth, 354 U.S. at page 485."

As a footnote to that portion of the Court's opinion, the following appeared:

**"Among the laws of Ohio which are indicative are the following. See Section 2905.34, Revised Code. Its pertinent parts are as follows: . . .*

"This statute was effective September 15, 1970, after the filing of the complaint, but before the decision of the lower court. The film was exhibited after the effective date, and the trial de novo was held after the effective date of the statute. Other statutes so considered are:

"Section 2905.08 Revised Code - Adultery or Fornication: Section 2905.10, Revised Code - Inducing illicit

intercourse; Section 2905.26, Revised Code - Prostitution, lewdness and assignation defined; Section 2905.30, Revised Code - Indecent exposure; Section 2905.31, Revised Code - Nudism; Section 2905.44, Revised Code - Sodomy." (Our emphasis.)

The Ohio Supreme Court in its opinion in *State ex rel. Keating V. Vixen*, 27 Ohio St. 2d 278, 272 N.E.2d 137 (July 21, 1971)[4] removed all doubt that the above decisional law represented an authoritative interpretation of the word "obscene" in the State of Ohio, at page 140:

> "Neither the First Amendment of the United States Constitution nor the Ohio Constitution will be construed as inhibiting the General Assembly from proscribing the commercial exploitation of a purported act of sexual intercourse.
>
> *"Since the real issue before this court is whether the injunction should be dissolved, or continued in force and effect, R. C. §§ 2905.34 and 2905.35 are applicable at this time notwithstanding their enactment postdates the*

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[4] On June 25, 1973, this Court entered the following order in *A Motion Picture Film Entitled "Vixen" v. State of Ohio, ex rel. Keating* ____U.S.____, ____L.Ed2____, ____93 S.Ct.____(June 25, 1973):

> "The motion of appellants to strike appellees supplemental brief in No. 71-599 is denied. The judgment(s) is vacated and the case remanded for further consideration in light of *Miller v. California*, ____U.S.____(1973); *Paris Adult Theatre I v. Slaton*, ____U.S.____(1973); *Kaplan v. California*, ____U.S.____(1973); *U.S. v. 12 200-ft. Reels of Super 8 mm. Film*, ____U.S.____(1973); *U.S. v. Orito*, ____U.S.____(1973); *Heller v. N.Y.*, ____U.S.____(1973); *Roaden v. Ky.*, ____U.S.____(1973); and *Alexander v. Virginia*, ____U.S.____(1973); Mr. Justice Douglas would reverse the judgment(s). See *Miller v. California, ante* (dissenting opinion of Justice Douglas). Mr. Justice Brennan, joined by Mr. Justice Stewart and Mr. Justice Marshall would vacate the judgment(s) and remand the case for further proceedings not inconsistent with his dissent in *Paris Adult Theatre I v. Slaton, ante*. See *Miller v. California, ante* (dissenting opinion of Justice Brennan)."

A petition for rehearing was filed by State of Ohio ex rel. Keating on July 20, 1973.

*injunction granted below.*

*"Those two sections, now the law of Ohio, when construed together and applied to the instant facts,* effectively provide that: 'No person, with knowledge of the content and character of the * * * motion picture * * * involved, shall * * * present such motion picture * * * before an audience which contains a series of display * * * of * * * sexual intercourse * * * the cumulative effect of which is a dominant tendency to appeal to prurient interest, when the appeal to such interest is * * * for commercial exploitation. * * * (Italicized words supplied.) So stated, they proscribe conduct which 'bears no necessary relationship to the freedom to speak, write, print or distribute information or opinion.' *Schneider v. State* (1939), 308 U.S. 147, 161, 60 S.Ct. 146, 150, 84 L.Ed. 155.

*"Doubt can no longer remain that the depiction of purported acts of sexual intercourse on the movie screen and the public exhibition thereof 'for commercial exploitation rather than for a genuine, scientific, educational sociological, moral, or artistic purpose' is forbidden by Ohio law. Here, there is no dispute as to the fact that 'Vixen' does depict numerous acts of purported sexual intercourse,* and obviously it does so for a commercial purpose. No useful purpose could be served by remanding the cause to a lower court for consideration of the impact of those two statutes. (Our emphasis.) * * *

*"Therefore, where scenes in a motion picture film depict purported acts of sexual intercourse and are exhibited for commercial exploitation, those scenes are violative of R. C. § § 2905.34 and 2905.35, constitute a 'nuisance' within the meaning of R.C. § 3767.01, and their exhibition may be enjoined as provided in R.C. § 3767.02 et seq." (Our emphasis).*

"It is an ancient maxim of the law that 'legis interpretatio legis vim obtinet'; that is to say, the authoritative interpretation put upon the written law by the courts acquires the force of law by becoming, as it were, a part of the statute itself. The importance of adhering to this rule is seen in the fact that the judicial explanation of an

obscure or ambiguous statute is at once accepted as correct by those whose rights or actions may be affected by the statute, and innumerable transactions will thereafter depend for their validity and effect upon the permanence of the judicial construction in view of which they were had. 'The court almost always, in deciding any question, creates a moral power above itself.' " Black on Interpretation of Laws, Second Editon at page 616.

**(B) Ohio Revised Code Section 2905.34, Which was Effective at the Time the State Abatement Action was Tried in the Allen County Common Pleas Court, Provided Specific Standards of the Type Exemplified by This Court in California v. Miller.[5]**

Ohio Revised Code Section 2905.34 reads as follows:

R.C. 2905.34:

As used in Sections 2903.13 to 2903.16, inclusive, and Sections 2905.34 and 2905.39, inclusive, of the Revised Code:

(A) Any material or performance is "obscene" if, when considered as a whole and judged with reference to ordinary adults, any of the following apply:

1. Its dominant appeal is to prurient interest;
2. Its dominant tendency is to arouse lust by displaying or depicting nudity, sexual excitement, or sexual conduct in a way which tends to represent human beings as mere objects of sexual appetite;
3. Its dominate tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence cruelty, or brutality;
4. It contains a series of displays or descriptions of nudity, sexual excitement, sexual conduct, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumula-

[5] Note, in particular, O.R.C. Section 2905.34A (2) and (4) and the reference in those sections to "sexual conduct" as that term is defined in Section 2905.34 (D).

tive effect of which is a dominant tendency to appeal to prurient interest, when the appeal to such interest is primarily for its own sake or for commercial exploitation, rather than for a genuine scientific, educational, sociological, moral, or artistic purpose.

(B) "Nudity" means the showing, representation, or depiction of human male or female genitals, pubic area, or buttocks with less than a full, opaque covering, or of a female breast with less than a full, opaque covering or any portion thereof below the top of the nipple, or of covered male genitals in a discernibly turgid state.

(C) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(D) "Sexual conduct" means masturbation, homosexuality, lesbianism, sadism, masochism, natural or unnatural sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, a breast.

(E) "Material" means any book, pamphlet, ballad, printed paper, phonographic record or tape, motion picture film, print, picture, figure, image, description, or other tangible thing capable of being used to arouse interest through sight, sound, or in any other manner.

(F) "Performance" means any motion picture, preview, play, show, skit, dance, or other exhibition performed before an audience.

**(C) Appellant, in the State Nuisance Abatement Complaint, pleaded specific violations of specific state standards. The trial court final judgment found such allegations to be true.**

In accordance with the appellate decisions in City of *Youngstown v. DeLoreto, supra; State of Ohio ex rel Ewing v. "Without A Stitch", supra, and State of Ohio ex rel Keating v. Vixen, supra*, appellant herein pleaded specifically the violation of specific state standards at paragraph 10 of his plead-

ings.[6] (See Appendix C-9 and 10, infra). Allen County Common Pleas Judge Light, in his final judgment of Nov. 10, 1972, found such allegations to be true. (See Appendix I-2, Infra).

[6] "10. That the exhibition of said motion picture films at the Cinema I hereinabove alleged constitutes a public nuisance as that term is defined in Section 3767.01 (C) of the Ohio Revised Code, which reads in part as follows:

"Section 3767.01 Definitions

As used in all sections of the Revised Code relating to nuisances:

(C) 'Nuisance' means that which is defined and declared by statutes to be such and also means any place in or upon which lewdness . . . is conducted, permitted, continued, or exists, or any place, in or upon which . . . obscene films . . . are screened, exhibited, or otherwise prepared or shown, and the personal property and contents used in conducting and maintaining any such place for any such purpose."

for the following reasons:

(a) Visual depiction of the private parts of the body in public or the visual depiction of sex acts in public, whether real or simulated, is conduct which is contrary to good morals, public decency, and the long-standing public policy of the people of the State of Ohio as expressed by the State Legislature in enacting Sections 2905.01, 2905.03, 2905.08, 2905.19, 2905.30, 2905.31, 2905.35, 2905.44, and other Sections in the Ohio Revised Code.

(b) The conduct described in subparagraph (a) above, if performed offstage and in public in three-dimensional form, would constitute violations of the laws of the State of Ohio regulating public displays of such sexual activity, and that reproduction on the motion picture screen in public in two-dimensional form, in the matter indicated, is contrary to good morals and public decency and constitutes obscenity as a matter of law.

(c) Such conduct is demonstrated by the following visual depictions in the time and motion studies hereinbefore referred to as Appendices A -- F.

APPENDIX A. "Wow, It's Cindy" and "Hot Spurs". Lesbianism depicted on pages 1, 4 and 5; cunnilingus depicted on pages 1 and 6; sexual intercourse depicted on pages 1, 2, 6 and 8; auto eroticism depicted on page 3; group sex depicted on pages 4, 5 and 7; fellatio depicted on pages 6 and 8.

VI

SECTIONS 3767.04 AND 3767.06 OF THE OHIO REVISED CODE ARE CONSTITUTIONAL ON THEIR FACE.

**(A) THE ERROR IN THE FEDERAL COURT'S LOGIC.**

The federal court below, in riveting its attention on the prior restraint "in personam" implications of *Near v. Minnesota* 283 US 697, 75 L.Ed 1357, 51 S.Ct. 625, completely lost sight of the fact that the Ohio Legislature had undertaken in O.R.C. sections 3767 et seq. to provide what, unquestionably, is an "in rem" and not an "in personam" remedy. The "in personam" provisions which troubled the federal court are not an essential part of the statutory scheme and should have been disregarded by that Court under the paramount rule of statutory construction which requires a Court to ascertain and, where possible, to give effect to the intent and

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APPENDIX B. "Prostitution, Pornography U.S.A." and "Oddly Coupled". Masturbation depicted on page 2; sexual intercourse depicted on pages 2, 3, 5, 7 and 16; fellatio depicted on pages 3, 6 and 10; anal sodomy depicted on page 5; sexual sadism depicted on pages 5 and 6; lesbianism depicted on pages 11 and 12; cunnilingus depicted on page 15; group sex depicted on pages 20 and 21.

APPENDIX C. "Sandra, The Making of a Woman" and "Diamond Stud". Sexual intercourse depicted on pages 3, 6, 15 and 22; auto eroticism depicted on pages 5 and 6; cunnilingus depicted on on pages 7, 8, 14 and 21; lesbianism depicted on page 9; rape depicted on pages 10, 11 and 14.

APPENDIX D. "Midnight Plowboy" and "Tobacco Roody". Lesbianism depicted on page 8; sexual intercourse depicted on pages 8, 9, 10, 17, 18, and 20; cunnilingus depicted on page 14; fellatio depicted on page 28.

APPENDIX E. "The Blue Hour" and "The Grabbers". Lesbianism depicted on pages 7 and 8; sexual intercourse depicted on pages 7 and 13; auto eroticism depicted on page 12; group rape depicted on pages 12 and 13.

APPENDIX F. "The Exotic Dreams of Casanova" and "Sweet Georgia". Sexual intercourse depicted on pages 1, 2, 8, 9, 15, 16, 21, 22, 23 and 24; masochism depicted on page 4; auto eroticism depicted on pages 14 and 24; lesbianism depicted on pages 19 and 20.

purpose of the legislature, as expressed in the statute. 82 C.J.S. Statutes, page 560. Compare the order and judgment of Federal District Judge Sam Pointer in the Alabama case, referred to at Point IV (B), page 48, a copy of which appears herein at Appendix AA, pages 32-35.

Instead of according the state lawsuit its historical treatment as one which involved the *status* of real property and a determination of whether or not the "res" constituted a public nuisance from which certain statutory penalties flowed, namely the forfeiture of the leasehold interest in such property (a legal equivalent of "loss of use for a year") and the forfeiture of the personal property used therein - an approach which presented absolutely no constitutional questions, see *U.S. v. U.S. Coin and Currency*, 401 US 715, 28 L.Ed 2, 434, 91 S.Ct. 1041 (Apr 5, 1971), *One Lot of Emerald Cut Stones and One Ring v. U. S.* ____U.S. ____, LEd.2d ____,S.Ct. (Dec.____, 1972) - the court for some reason felt constrained to focus its attention on particular language of the statute which, when viewed by itself and apart from the general statutory scheme might, as an in personam restriction against an individual, be questioned under the *Near v. Minnesota, supra*, prior restraint doctrine.

Appellants herein submit that the error in the logic of the federal district court's opinion (Appendix A pages 3-12) is the result of faulty deductive reasoning, which proceeded somewhat as follows:

*Major Premise:* To enjoin the showing of films in the future without a prior adversary hearing on the obscenity of such films is a prior restraint and unconstitutional under *Near v. Minnesota, supra,* (see A-11)

*Minor Premise:* The Ohio Public Nuisance statute, O.R.C. sections 3767.04 and 3767.06 operate to prevent the showing of films in the future without an adversary hearing on the obscenity of those films. (see A-4,A-10, A-11)

*Conclusion:* The Ohio Public Nuisance statute, O.R.C. sections 3767.04 and 3767.06 are unconstitutional.

The syllogism formed by the above three propositions is inaccurate for the facts in the minor premise have been used

falsely, not having been given in their actual setting of experience, but abstractly from a larger whole of circumstances. See Legal Reasoning and Briefing, by Brumbaugh, copyright 1917 by the Bobbs-Merrill Co. at page 56:

"The situation is different if the answer or plea be one in confession and avoidance. Logically considered, *the admission or confession is not that the two premises are legally connected, but merely on the face logically correct. They are admitted to be, parts only, of a larger whole of circumstances which the complaint has not adequately set out*, and hence is an instance of where legal logic varies from ordinary logic. The latter concerns itself merely with the correct relationship of particulars and rules, but law looks into the actual background of fact. We have seen elsewhere that legal logic defines its own concepts, and prescribes the number, condition, and nature of its facts - now we perceive that it demands also that all of such facts be correctly reported. *Certain facts, therefore, in a pleading may be confessed as true, but at the same time not true for the purpose and effect for which they were originally drawn up, that is to say, their legal effect as the Minor Premise of a legal syllogism is false, because the facts have been used falsely, not having been given in their actual setting of experience, but abstracted from a larger whole of circumstances.* Thus, a part removed from the whole of which it is a part no longer appears in its true significance, and it is this falsity of a want of completeness against which an answer Confession and Avoidance is directed.

"*The effect of an answer in Confession and Avoidance, from the syllogistic side, is to eliminate the general rule of law as inapplicable to the actual and complete set of facts, and by means of the new matter which is added, completely change the coloring of the Minor Premise, so that it no longer expresses any cause of action against the defendant, or one of a different import and effect.* In such manner the whole legal syllogism, as first set up by the complaint, vanishes. However, it does not follow that a trial will be made unnecessary, for the new matter alleged

in the answer may in turn be denied, and this issue of fact will then be tried upon its merits. In such case the validity of the primary syllogism is held in obeyance until the latter question upon which it is now conditioned is determined. If the new matter is relevant and proved true, the whole original cause of action will disappear, or be modified, but if not, then the two premises alleged in the first pleading will become legally effective without further proof.

"In addition to pleadings by way of denial or confession and avoidance there may occur an answer calling for matter especially pleaded by way of estoppel, or otherwise, as for instance the Statute of Limitations, Statute of Frauds, Res Adjudicata, or defenses in suspension or abatement of the writ. What particular relation have these and other similar special pleadings to the syllogistic premises set out in the plaintiff's complaint or declaration? Unquestionably we have here another example of what was pointed out in the first chapter to be a variance of legal logic from ordinary logic. Somewhat in the nature of an avoidance without a confession, it does not deny the truth and validity of the rule of law to the case, nor does it question its applicability to the facts as alleged in the Minor Premise, but *it does a very unique thing - it invokes a wider rule of law within which the rule plead in the first pleading is but a part, just as in Confession and Avoidance, a wider sphere of fact was plead - and thus it challenges the right of the plaintiff to put the special set of facts in issue.* Hence, a greater rule of law is plead against a lesser, a more comprehensive syllogism over a lesser - the first plead by alleging the Minor Premise and implying the Major Premise, the second by pleading the Major Premise and implying the Minor Premise." (our emphasis)

On the above matter, consider the following second syllogism:

*Major Premise:* Under the ancient doctrine of deodand expressed in *U.S. v. U. S. Coin and Currency, supra,* and *One Lot of Emerald Cut Stones and One Ring v. U.S. supra,* where a place is determined in a legal proceedings to be

operating as a public nuisance involving contraband, a penalty may be applied forfeiting the leasehold interest in the real property used in conducting such nuisance for a period of up to one year.

*Minor Premise:* The Ohio Public Nuisance Statute, O.R.C. sections 3767.04 and 3767.06 operate to prevent the showing of films in the future without an adversary hearing on the obscenity of those films thru forfeiture of the leasehold (use of the premises) as a penalty.

*Conclusion:* The Ohio Public Nuisance statute O.R.C. sections 3767.04 and 3767.06 are constitutional.

## (B) HISTORICAL BACKGROUND

Consider the following hypothetical situation: Suppose that, over a period of several months, Jurisdiction "A" filed a succession of seven different criminal complaints against an activity, alleging that on each of those seven occasions two obscene motion picture films were exhibited, and that the obscenity laws had been violated by such conduct at that address. Suppose further, that, after each criminal charge a criminal trial had taken place and the defendant had been found guilty as charged. Can there be any doubt that, under general principles of law and without benefit of statute, a district attorney in that jurisdiction could successfully state a civil cause of action, alleging that the repeated and continuing illegal conduct at that address constituted a public nuisance which should be abated? Is there any doubt that an equity court could make a finding that such repeated illegal conduct at that address constituted a public nuisance and, upon a further finding that such condition *was continuing and presently existed*, could authorize that the same be closed as a public nuisance? Further, is there any doubt that, having found the public nuisance to be *presently in being*, the equity court could lay down the conditions upon which the activity might remain in operation, one of which could be that the errant party show to the satisfaction of the court that the public nuisance no longer existed? See *Crain v. State*, 3 Ind. 193 (1851); Perkins on Criminal Law, Foundation Press, 1954; *Bloss v. Paris Township*, 157 N.W.

2d 260 (Apr. 1, 1968); Joyce, Law of Nuisances, Sect. 7, page 15; *Cactus Corporation d.b.a. The Apache Drive-in Theatre v. State of Arizona ex rel Murphy, City Attorney of Tuscon*, 480 P.2d 375 (Feb. 9, 1971); *Evans Theatre Corp. et al v. Slaton*, 227 Ga. 377, 180 S.E.2d 712 (Mar. 4, 1971), cert. den. Nov. 7, 1971, in 404 U.S. 950, 30 L.Ed.2d 267, 92 S.Ct. 281; *Weis v. Superior Court of San Diego County*, 30 Cal. App. 730, cited with approval in *California v. Lim*, 18 Cal.2d 872.

Add an additional factor for a new hypothetical. Suppose that in the above Jurisdiction "A", the legal process for getting criminal matters to trial and for getting such criminal matters to trial and for getting such criminal trials finalized has been rendered inoperative for any of a number of reasons, may Jurisdiction "A" make an end around run on the criminal trial pitfall and select, in the first instance, as the primary law enforcement tool, the civil action to abate a public nuisance, alleging and proving in that single trial a course of continuing conduct by establishing as evidence the acts which comprise the seven alleged criminal violations, and asking that the law of forfeitures in connection with public nuisances be applied?

To ask the above rhetorical questions is to supply the obvious answers. The power of the state court in such matters is clear. In *Kingsley Book, Inc. v. Brown*, 354 U.S. 436, Justice Frankfurter, writing for the majority court, supplied the following answer at page 441:

> "We need not linger over the suggestion that something can be drawn out of the due process clause of the Fourteenth Amendment that restricts New York to the criminal process in seeking to protect its people against the dissemination of pornography. It is not for this court thus to limit the state in resorting to various weapons in the armory of the law. *Whether proscribed conduct is to be visited by a criminal prosecution or by a qui tam action*, or by an injunction or by some or all of these remedies in combination *is a matter within the legislature's range of choice (citation).* If New York chooses to subject persons who disseminate obscene

> 'literature' to criminal prosecution *and also to treat with such books as deodands of old, or both,* with due regard of course, to appropriate opportunities for the trial of the underlying issue, it is not for us to gainsay its selection of remedies. . . ." (our emphasis.)

The terms "qui tam action" and "deodand", referred to by Justice Frankfurter, are defined in Black's Law Dictionary, Revised, 4th Editon, as:

> "QUI TAM. Lat. 'Who as well .' An action brought by an informer under a statute *which establishes a penalty for the commission or omission of a certain act,* and provides that the same shall be recoverable in a civil action, part of the penalty to go to any person who will bring such action and the remainder to the state or some other institution, is called a 'qui tam action'; because the plaintiff states that he sues as well for the state as for himself. See In Re Barker, 56 Vt. 14; Grover v. Morris, 73 N.Y. 478." (our emphasis.)

> "DEODAND (L.Lat. DEO dandum, a thing to be given to God) in English law. *Any personal chattel which was the immediate occasion of the death of any reasonable creature, and which was forfeited to the Crown* to be applied to pious uses, and distributed in alms by the High Almoner. 1 Hale, P.C. 419; Fleta, Lib 1, C25; 1 Bl. Comm. 300; 2 Steth. Comm. 365. See Parker-Harris Co. v. Tate, 135 Tenn. 509, 188 S.W. 54, LRA 1916F, 935." (our Emphasis)

When the authors of the Ohio Public Nuisance Statute first sat down, over 50 years ago, to draft new legislation on this ancient problem, they were thinking of the laws of forfeiture and deodand when they pondered new solutions in this area of public nuisance, to compensate for certain inadequacies of the criminal law.

Ohio Revised Code, Section 3767 et seq. providing for abatement of public nuisances and certain forfeitures in connection therewith, had its derivation at a time in our history when lewdness of a different type was plaguing the Nation.

The procedural problems however, were quite similar. See 20 Columbia Law Review, at 604, which traces the history of such litigation:

> " 'RED LIGHT' INJUNCTION AND ABATEMENT ACTS' – *The strong arm of equity has lately found increasing employment through the enactment in thirty-eight states of 'Red Light' laws for the abatement of disorderly houses.* Modelled upon the liquor laws which originated in Iowa, these laws owe their enactment *to the inadequacy of criminal prosecutions;* and accordingly permit any citizen of the county wherein the nuisance exists to bring his civil action to enjoin and abate it. The effectiveness of the legislation lies in stringent provisions for abatement and in penalities for contempt.
>
> "This is clearly police legislation, designed to protect the public health and morals rather than to provide a remedy for injury to private property. For instance, the injunction is made binding upon the defendants throughout the jurisdiction of the court and frequently throughout the entire state. Not only are the costs of the action made a lien upon the premises; but in many states a 'tax' or fine is levied when the final injunction is issued. . ." (our emphasis.)

The historical development of this type of statute has been in three directions: (1) Some states, like Missouri, use language which is clearly limited to houses of prostitution (M.R.S. Section 563.120); (2) other states, like California, have used statutory language like "Prostitution, assignation and lewdness" in which, by judicial decision, the term "lewdness" has been given a broad meaning. See *People v. Bayside Land Co.*, 48 Cal App. 257, 191 P. 944, where the word "lewdness" in Penal Code Sect. 11225, was given broad significance so as to include all other immoral or degenerate conduct or conversation between persons of opposite sexes and was held not limited to "assignation" and "prostitution." See also the dissent of Justice Herndon in *Harmer v. Tonylyn Productions Inc.*, 100 Cal. Rptr 576, 577-583 (Mar 2, 1972) and *People ex rel Hicks v. "Sarong Gal"* 103 Cal. Rptr 414 (Aug 3, 1972) (3) other states, like Ohio and Louisiana have

adopted amendments which specifically includes places where obscenity is exhibited (O.R.C., Section 3767.01).

## (C) OPERATION OF OHIO REVISED CODE, SECTIONS 3767 ET SEQ.

1. General

In Ohio, where the statutory language defining "nuisance" specifically encompasses a place where obscene films are exhibited, the operation of the statute in general is quite simple. Its constitutionality as applied to one motion picture film "I Am Curious (Yellow)" was challenged and upheld by a three-judge court in *Grove Press, Inc. v. Flask*, 326 F.Supp. 574 (Mar. 10, 1970) (Celebrezze, Green, Batiste) see *Grove Press Inc. v. Flask* ____*U.S.*___ , ____ L.Ed.2d ___, ____S.Ct. (June 25, 1973) vacated and remanded for further recomsider in light of *Miller v. California*____U.S. ____June 21, 1972. While the *Flask* decision is now questioned by the three-judge court herein, where it attacks the operation of the statute at page 7:

> "Thus, upon a determination that as few as one or two films shown at a given theatre are obscene, the theatre can be ordered closed under this section for a period of one year regardless of the nature of any other films which the owner or operator may have intended to show during that period, with the burden on the owner to come into court and prove the non-obscenity of any such other film. . . .",

that objection is not well taken, as explained hereinafter. In the first place, the theatre cannot be shut down unless the trial judge is convinced from the evidence that the public nuisance is *continuing* and *presently exists*. If for example, the public nuisance was found to exist solely on the basis of "I Am Curious (Yellow)" and such showing was not representative of the course of conduct normally experienced, then it could not reasonably be said that a public nuisance exists if, at the time of the trial judge's finding and the preliminary injunction, the film is not showing, having been "pulled" by a responsible exhibitor.

This does not say, however, that the exhibition of one

film alone cannot under the statute, be the proper basis for a judicial closing of a theatre for a year as a public nuisance. Take for example the hypothetical case of the Pussy Cat Theatre in Hollywood, California which regularly exhibits so-called "Adult Films", which any reasonable person would regard as being of the prosecutable variety. Suppose that on December 1, 1972, the Pussy Cat Theatre commences the public exhibition of a nationally known controversial 62 minute film showing nothing but oral copulation of the male penis in the mouth of a female (which act when publicly performed in California is a felony). The movie ad page advertising the film for December 1, 1972, is as shown on adjoining page 71 and describes the film only as "It". Thereafter criminal charges are filed, but nine months later that matter has not yet come to trial for a number of procedural reasons, such as attacks on the right to procure a copy for trial by subpoena or search warrant, etc. The news ad 5 months later on Apr. 20, 1973, is as shown on adjoining page 72 and reads "How Long? We will continue to show 'Deep Throat' until you no longer care to see it." Nine months later on August 10 , 1973 it is as shown on adjoining page 73. Does this Court have any serious doubt that a district attorney has an inherent right, independent of statute, as a representative of government to bring a *civil* action to abate the film itself as a public nuisance and, where the film is exhibited after the action is filed, and is still being shown when the trial judge finds that the same is a public nuisance, to require that the theatre be padlocked for a year.

The difference in the results reached in the "I Am Curious (Yellow)" and "Deep Throat" examples referred to above is obvious. To state a general rule which must follow from either hypothetical, as indulged in by the three-judge court herein is to fail to recognize the rule expressed by this court in *U.S. v. Raines, supra*, at a time when it should be applied. Does the "Deep Throat" fact situation noted above, affect the straw man constructed by the federal court reading:

> "Thus, upon a determination that as few as one or two films shown at a given theatre are obscene, the theatre

POOR COPY

# Mehta and Philharmonic End Japan Tour

TIN BERNHEIMER

## San Diego Offers Medea' Premiere

REVIEW

## tricia Brooks Subs Traviata' Role


GENERAL CINEMA

"DISTINCTIVELY ENTERTAINING"
THE RULING CLASS

GEORGE C. SCOTT
"A POWERHOUSE..."
"GUT-GRABBING"
"A POWERFUL FILM"

GEORGE C. SCOTT
RAGE

A FREE GIFT
TO INTRODUCE YOU TO THE FINEST IN
ADULT HARDCORE ENTERTAINMENT
CINEMA 1200 THEATRE

CLEOPATRA'S BEAUTY SECRET... was a LANOLIN?

1ST RUN HARD CORE "VIRGIN LOST"
"CHAMPAGNE PARTY"

ADULT THEATRE

SHO-MOR

21

3rd SMASH WEEK

LUNCH

PO-NO

"BAD BAD GANG"

OK, LET'S FACE IT! HOW FAR DOES A GIRL HAVE TO GO TO UNTANGLE HER TINGLE?

PUSSYCAT - OL 4-57

assemary's Baby

SPECIAL HOLIDAY SHOW
TRIPLE FEATURE
EROTIC ADULT MOVIES
(LADIES WITH ESCORT FREE ON 901)

YALE
ADULT MOVIE THEATRE
"EROTIC BOUTIQUE"
"LAST TIME"
"SUNSET SQUIRT"

CAVE
ADULT MOVIE THEATRE
"HOT SECRETARIES"
"HELL HAS BELL"
"WAKE UP GIRLS"

ADULT MOVIES ADULT MOVIES ADULT MOVIES ADULT MOVIES

TOPAR THEATRES

THIS IS THE FILM TO SEE!

The Devil in Miss Jones

CINE CINEGA

BEDROOM BEDLAM
OVEREXPOSURE
CAVE YALE

INTENSE... SENSUAL... EROTIC... EXCITING!
THE SEXUAL SECRET OF MARILYNNA
CINEMA

STRICTLY EROTIC HARDCORE FEATURES
CINE I & II
WORLD PREMIERE
"LOVE OFFICE STY[illegible]"

VENICE
BIG DOUBLE FEATURE
OPEN 10 AM to 2 AM
STARTS EACH FRIDAY WITH SPECIAL SNEAK PEAKS THROUGHOUT THE WEEK
THE SAHARA
STRICTLY EROTIC HARDCORE FEATURES

2nd SMASH WEEK
SPECIAL DAYTIME FOR COUPLES
DEVONSHIRE CINEMA

THE 1st RUN | THE SANDBOX
THE VENTURE | THE ROXIE

MINI THEATRE

ADULT LIVE SHOW

WE ARE OPEN

Because of many rumors and thousands of phone calls, we wanted to answer some of the questions you, the CONSENTING ADULT PUBLIC are asking.

1. Yes... 'Deep Throat' is still showing.
2. No... The film has not been cut or altered. You will see the original, uncut, uncensored version.
3. How Long??? We will continue to show 'Deep Throat' until you no longer care to see it.

THE ONE AND ONLY DEEP THROAT

PUSSYCAT · 654-5742

DYNAMITE

STUDIO THEATRE
ADMISSION $1.00 WITH THIS AD

ADULT MOVIES
IN THE PRIVACY OF YOUR OWN ROOM!!!

SHO-MOR

CINE CINEGA

"X" Rated — No one under 17 admitted.

SELECT-A

EXTRA! EXTRA!
HELD OVER
THE HIGH WED
"THE SEX GIRL"
PLUS "CASTING CALL"
MAYAN
A TOTALLY NEW CONCEPT IN EROTIC MOVIE MAGIC
Runaway Hormones
"DROP OUT"
ROXY
FINE ARTS
RITZ

CRISS AND MARBLE WITH THE CHEEK LADIES

LENNY BRUCE

PUSSYCAT THEATRES

CLOSEST OF KIN

MADE TO ORDER

DOCTOR! DOCTOR!
X-RATED

15 BEST
3 MIDNITE HOURS
STAG

"HOT RODS"
DAKOTA in "ROADSTAR"

GLAND HOTEL

World's Biggest Nonstop GIRL SHOW
CORONET
LA CIENEGA at BEVERLY DRIVE

ALL BRAND NEW SHOW
LIVE GIRLS
Featuring SHARRON LEE
STRIPPERS Galore TOTAL ACTION

PLUS! GIANT COLOR SCREEN
"Erotic Parades"
HARDCORE as you Like it
3 SOLID HOURS
OPEN 12 NOON COME ALL DAY & Sleep

PO-NO
ONE WEEK ONLY
"HOLLYWOOD — PASSION CITY"
DON'T MISS THIS ONE
PLUS A LINEUP OF ALL NEW ALL DIFFERENT HARDCORE FEATURETTES

FILM FESTIVAL
Proudly Presents
ONE HOT FOR SALE Plus STUFF

Medix Will Blend Humor With Health

"THE MOST EXCITING COPS AND ROBBERS PICTURE SINCE 'THE FRENCH CONNECTION.'"

BADGE 373

NOW PLAYING at a Theatre Near You!

# O LUCKY MOVIEGOER!

"Lindsay Anderson has only made three feature-length films: 'This Sporting life' in 1963, 'If...' in 1968 and now 'O Lucky Man!' in 1973. But the first two were enough to establish him as one of the world's most powerful and individual directors, and the new work – more ambitious, adventurous and accessible than the earlier films – can only extend his reputation. 'O Lucky Man!' has a ceaseless power of invention and surprise."

Malcolm McDowell Lindsay Anderson O LUCKY MAN!

Cinema

A CLOCKWORK ORANGE PREFERENCE

SAVE THE TIGER

ADULT MOVIES ADULT MOVIES ADULT MOVIES ADULT MOVIES

5th SENSATIONAL MONTH!

APPEARING IN PERSON TODAY & SATURDAY

THE STAR OF "DEVIL IN MISS JONES" – GEORGINA SPEVLIN MEET HER IN PERSON – CRITICS SAY:

MISS SPEVLIN APPEARS AT THE FOLLOWING TIMES:

# The Devil in Miss Jones

THEY DO THE STRANGEST THINGS!

BROTHER & SISTER

ADULTS ONLY

NO ONE UNDER 18

PUSSYCAT THEATRES

PLUS SECOND HIT FROM ENGLAND SINCE THE NEW PERMISSIVENESS

STARTED

ROOM 11

ADULTS ONLY

Xanadu

3 HOUR SHOW

"TEENAGE LOVE"

EXPLICIT-TENDER STIMULATORS

LADIES WITH ESCORTS FREE ANYTIME

THE TOUCH OF his hand.

ADULTS ONLY

LAS PALMAS

FOUR CONVENIENTLY LOCATED THEATRES

CORBIN

LARGEST, HOTTEST TOTAL GIRL SHOW IN TOWN

FEATURING THE WORLD'S HOTTEST COLLECTION OF EXOTICS IN ACTION!

FIVE GIRLS ON STAGE!

IN PERSON!–TOTAL ACTION

Miss FLAMES!

HEATHER Fields

CORONET

PO-NO ADULT THEATRE

Just Arrived

Kim Come Home

PLUS A LINEUP OF FEATURETTES YOU HAVE BEEN ASKING FOR. DON'T MISS THIS ONE!

ADULTS ONLY

Ties All Records – 39th Week

DEEP THROAT ...IS IT!

PUSSYCAT - OL4-5742

7134 SANTA MONICA BLVD. HOLLYWOOD

The advertisements listed under the "Adult Movies" banner in The Times include assorted adult films or entertainment and "X" rated movies.

CASEY DONOVAN THE BACK ROW

ADDED HUNK ...a California Adventure!

MAKE WAY FOR HANDS DOWN!!

PARIS

THE LAST TIMES IN ACAPULCO

WARNING

6th SENSATIONAL MONTH!

TOUGH SEX FOR

I HAPPENED IN HOLLYWOOD

CINEMA

PRO ROOM

ADULT THEATRE

1ST RUN

713 N. WESTERN

HOLLYWOOD

463-9778

X Rating – No one under 17 admitted. The rating program provides that no one under 17 may attend. This is exclusively an adult film in theme and treatment and this is why no one under 17 may be admitted to the theater. The age limit may be higher in certain areas of the country.

SEXUAL AWARENESS

ADULT MOVIES

BIZARRE PORNO FILMS from JAPAN!

SWORD of ACTION

Okami & Yoshimura

NOW SHOWING

LUXURIOUS MAYAN

DRAKE THEATRE

3 HOURS OF RAUNCHY ENTERTAINMENT

OPEN 24 HOURS – 7 DAYS A WEEK

ADMISSION ONLY 3.00

BURLESK ARENA

Erotika

XPS

ADULT THEATRE

"X" Rated – No one under 17 admitted. These films are exclusively adult in theme and treatment.

THE SANDBOX

> can be ordered closed under this section for a period of one year regardless of the nature of any other films which the owner or operator may have intended to show during that period, with the burden on the owner to come into court and prove the non-obscenity of any such other film. . . ."?

Certainly, if the Federal District Court had considered the "Deep Throat" hypothetical and the subject matter therein involved, it would have had to restudy its hypothesis. The rule that a statute may be constitutional as applied to one set of facts, whereas it would be unconstitutional as applied to another set of facts is so well known as not to require citation of authority. During arguments on Mar 12, 1973, the three-judge court paid lip service to that rule:

> "THE COURT: I am sure counsel is aware we can hold a statute constitutional, but unconstitutional as it being applied and that--well, the question before us is if that was a constitutional section there, we still would also reserve the right to make the determination whether you are applying it constitutionaly. . . ." (T. page 19, lines 16-22.),

In the case herein, the Federal District Court's failure to apply that rule was error. See Memorandum in Support of Motion to Dismiss in *Pursue, Ltd. v. Huffman* (Appendix O, pages 4-7) and (Appendices P, Q and R).

2. *Ohio Revised Code Section 3767.04*

The action is commenced by the filing of a verified petition. R.C. Section 3767.04. Where the filing is by a citizen, a bond in the sum of not less than $500.00 is required to secure the payment of damages if such action is wrongfully brought. R.C. Section 3767.03. Upon the filing of the complaint, several discretions or options are given to the person upon whose relation the state action was brought, and to the trial judge, which if exercised, may result in other options (and also mandates). The person *may* or *may not* apply for a temporary injunction. If he does, the judge *must* grant a hearing within 10 days after the filing of the petition. Where the

complaining party, *in his discretion, decides* to apply for a preliminary injunction, *he may also, in his own discretion,* apply for an ex parte restraining order to prevent the personal property and contents of the place from being removed until the court's ruling on the preliminary injunction. Where such application is made, the judge has a discretion and *may* or *may not* grant such restraining order. See R.C. Section 3767.04, which provides, in part, as follows: (see Appendix B, page 5)

> "After the filing of the petition, application for a temporary injunction may be made to the court or a judge thereof who shall grant a hearing within 10 days after the filing. Where such application for a temporary injunction is made, the court or judge thereof, may, on application of the complainant, issue an ex parte restraining order, restraining the defendant and all other persons from removing or in any manner interfering with the personal property and contents of the place where such nuisance is alleged to exist until the decision of the court or judge granting or refusing such temporary injunction and until the further order of the court thereon. . . ."

The use of the term 'may' and 'shall' in the above context is quite clear. In the interpretation or construction of statutes, the primary and paramount rule is to ascertain, declare, and give effect to the intention of the Legislature if it is possible to do so. 50 Ohio Jur. 2d, Statutes, at page 139. In this connection see Black on Interpretation of Laws, 2nd Ed., at page 531, et seq.:

> "The words 'may,' 'authorized,' 'shall,' 'must,' and the like, as employed in statutes, are first of all to be presumed to have been used in their natural and ordinary sense, and they will be so understood unless such a construction would be obviously repugnant to the intention of the legislature, or would lead to some inconvenience or absurdity. It has sometimes been loosely said that 'may' and 'shall,'

as used in statutes are interchangeable terms. But this is not correct. To convert such terms, the one into the other, at the mere will of the court, would be little short of substantive legislation. It is true that this may be done where it is imperatively necessary to prevent an irreparable mischief or an invasion of vested rights, and where the public interest or the fixed rights of individuals are concerned. But otherwise it is not permissible to put a forced or strained construction upon words of this character, to elevate merely permissive words into the force of a command, or to soften imperative expressions into a mere grant of license or authority.

"Taken in its natural and ordinary sense, the word 'may' does not import a command, but merely signifies permission, ability, or possibility, and generally it denotes that the action spoken of is optional with the person concerned, or rests in the discretion of the court or body to which license or permission is given. And the word always retains this primary meaning unless a different construction is necessary to give effect to the clear purpose and intention of the legislature, to make the statute accord with settled public policy, or to save the rights of parties in interest. For example, in a statute providing that whoever is found in a state of intoxication in a public place may be arrested without a warrant by a police officer, the language is permissive. It gives authority to the officers named to use their discretion in regard to making the arrest, considering all the circumstances of the particular case, but does not require them at all hazards to arrest such a person. But the word 'may' should be taken as equivalent to 'must' in all cases where it is evident that the legislature means to impose a positive and absolute duty, and not merely to give a discretionary power. And it is well settled that 'may,' in any statute, is to be construed as equivalent to 'shall' or 'must' when the public

> interests or rights are concerned, and when the public or third persons have a right de jure to claim that the power granted should be exercised.
>
> "On the other hand, 'shall' and 'must' are words of command. Taken in their usual and proper meaning, they leave no room for choice or discretion, but are imperative; and they will be presumed to have been used in this sense, unless something in the character of the statute or the subject to which it relates, or in the context, shows that this could not have been the intention of the legislature."

The ex parte restraining order authorized by Section 3767.04, *if applied for* at the time of filing the application for a preliminary injunction, and *if issued* by the trial court, does not amount to a prior restraint of free speech. See *Grove Press, Inc. v. Flask*, 326 F. Supp. 574, 579 (Mar. 10, 1970); *U.S. v. Little Beaver Theatre, Inc.*, 324 F. Supp. 120, 121 (Jan. 15, 1971); *Go v. Peterson*, 480 P.2d 35, 36 (Feb. 1, 1971), *Walter v. Slaton*, 182 S.E.2d 464, 467 (May 13, 1971). Nor was it established for anything related to that purpose. The Legislature, in specifically authorizing the court to bring such contents within the court's jurisdiction, did so for the purpose of assuring that the special provisions established by the Legislature might be given effect, i.e., so that the forfeiture established by Section 3767.01(C) (which declared all such personal property and contents to be a nuisance) might be effective in carrying out the summary remedy afforded by Section 3767.06 (which provides for the sale of such personal property) and Section 3767.11 (which provides that the "proceeds of the sale of the personal property. . .shall be applied in payment of the costs of the action and abatement including the complainant's costs . . . .")

The third paragraph of Section 3767.04 sets forth in clear language what must follow where the complaining party establishes the right of the state to relief at the hearing on the preliminary injunction. That paragraph provides that the injunction *shall issue without additional bond* (a grant of authority which is uncommon in temporary injunction causes.

See 29 O. Jur.2d, Injunctions §126 Bond or Other Security, at page 419). That paragraph provides, in part:

> "If upon hearing the allegations of the petition are sustained to the satisfaction of the court or judge, the court or judge *shall issue a temporary injunction without additional bond* restraining the defendant and any other person from continuing the nuisance. . . ." (Our emphasis.)

See Black on Interpretation of the Law, supra, as to the meaning of "shall".

The temporary injunction, authorized by O.R.C. Sect. 3767.04, operates in a dual capacity: both against the person of the defendants who are before the court, and against the property (the res), which is also before the court: (by posting a copy of the order on the premises). The "in personam" aspect is not an essential part of what is clearly an "in rem" statutory scheme, and should have been disregarded by the federal district court under the paramount rule of statutory construction which requires a court to give effect to the intent and purpose of the legislature. At the very least, the court should have taken the route followed by Federal District Judge Sam Pointer which would have permitted the state courts to hear an appeal and give definition to the statute. (See Appendix AA pages 32-35.)

In the next sentence of the same section, the Legislature accorded summary relief to the state against the real estate. Where the complainant at such hearing on the preliminary injunction establishes the fact of a public nuisance and the right of the state to a preliminary injunction, the court *is mandated thereby* to issue an *order closing the place against its use for* any purpose of lewdness until final decision is rendered on the application for a permanent injunction *unless "the person owning, in control or in charge of the nuisance so enjoined shows to the satisfaction of the court or judge that the nuisance complained of is abated."* The language of the statute is:

> "If at the time of granting a temporary injunction, it further appears that the person owning, in control, or in charge of the nuisance so enjoined had re-

ceived five days' notice of the hearing and *unless such person shows to the satisfaction of the court or judge that the nuisance complained of is abated*, or that such person proceeded forthwith to enforce his rights under Section 3767.10 of the Revised Code, the court or judge *shall forthwith issue an order closing the place against its use for any* purpose of lewdness, assignation, or prostitution until final decision is rendered on the application for a permanent injunction. . . ." (our emphasis)

Under the above closure provision, *the leasehold interest* where such public nuisance is conducted or maintained and *the personal property* and contents located and used *therein are to be forfeited* until final decision is rendered on the application for a permanent injunction *unless either of two conditions is shown to exist, namely:* (1) That the person "owning, in control, or in charge of the nuisance so enjoined. . ." *affirmatively* "shows to the satisfaction of the court. . . that the nuisance complained of is abated," or (2) That the lessor of such a place, being used by the tenant for the purpose of lewdness, affirmatively shows to the satisfaction of the court that he proceeded forthwith to void the tenant's lease as authorized by O.R.C. section 3767.10 and has regained possession of the premises.

O.R.C. section 3767.04 further allows the owner of any real property so restricted to appear at any time between the filing of the petition to abate the nuisance and the hearing on the application for a permanent injunction and regain possession of such real property by fulfilling three requirements; namely (1) Payment of all costs incurred; (2) Filing a bond as owner of such real property conditioned that he will immediately abate the nuisance and prevent the same from being maintained until decision by the court on the application for a permanent injunction and (3) Satisfying the court of his good faith. The statute also allows the owner of any personal property so restricted to appear at any time between the filing of the petition to abate the nuisance and the hearing on the application for a permanent injunction therein and to regain possession of such personal property by fulfilling two require-

ments, namely (1) Payment of all costs incurred, and (2) Satisfying the court of his innocence of any knowledge of the use of such personal property as a nuisance and that with reasonable care he could not have known thereof.

At the time of the trial judge's ruling in the Common Pleas court below, it was clear, beyond doubt, that absolute judicial restriction at this point of the proceeding - after trial on the merits - was entirely proper. The right of a state court system to impose a judicial restraint by way of preliminary injunction after a hearing on the merits, is no longer a debatable issue. The constitutional requirement for a "prompt final judicial decision" referred to by this court in administrative prior restraint cases such as, *Marcus v. Search Warrants*, 367 U.S. 717, 6 L.Ed.2d 1127, 81 S.Ct. 1708 (June 19, 1961); *A Quantity of Books v. Kansas*, 378 U.S. 205, 84 S. Ct. 1723, 12 L.Ed2d 809 (June 22, 1964); *Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (Mar. 1, 1965), and *Teitel Film Corp. v. Cusack*, 390 U.S. 139, 19 L.Ed.2d 966, 88 S. Ct. 754 (Jan. 29, 1968), had reference to a speedy determination *by a trial court* as distinguished from a prior restraint applied in administrative proceedings. If the language and reference of this court in *Teitel Film* at page 969 to "prompt final judicial decision by the trial court":

> ". . . The Chicago censorship procedures violate these standards in two respects. . . (2) the absence of any provision for a *prompt judicial decision by the trial court* violates the standard that. . .the procedure must also assure a prompt final judicial decision . . . ." (our emphasis.)

was not clear, that issue was laid to rest in *Interstate Circuit Inc. v. Dallas* 390 U.S. 676, 20 L.Ed 2d225, at 235, fn22, 88 S.Ct. 1298 decided on Apr. 22, 1968 of the same term of court.

> "22. Appellants also assert that the city ordinance violates the teachings of *Freedman v. Maryland, supra, because it does not secure prompt state appellate reveiw. The assurance of a 'prompt final judicial decision'* (380 U.S. at 59, 13 L.Ed.2d at

> 655) *is made here, we think, by the guarantee of a speedy determination in the trial court* (in this case nine days after the Board's classification). *see Teitel Film Corp. v. Cusack*, 390 U.S. 139, 19 L.Ed. 2d 966, 88 S.Ct. 754. . . ." (our Emphasis.)

The *Interstate Circuit* decision gives a crystal clear understanding of what this court meant in *Freedman* by "prompt, final judicial decision." The court is *not* making an issue out of the time period which is expended in carrying out the appellate review. That was one of the issues in the *Interstate Circuit* case. See the Jurisdictional Question and Arguments of Appellant Interstate Circuit in their brief on the merits at pages 3, 20 and 21. See also *U.S. v. 37 Photographs*, 402 U.S. 363, 91 S. Ct. 1400, 28 L.Ed.2d 822, at pages 830-833 (May 3, 1971), which authorizes actual prior restraints by way of court order for a reasonable period of time in advance of a final determination of the obscenity issue by the *trial court* in Federal Customs cases.

That the judicial restraint may be applied after an adversary hearing at the *preliminary injunction* stage does not raise any additional procedural issues for, as authorized by Civil Rule 65(B)(2), the Ohio Trial Court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application.

After the decision went against Cinema I Theatre and William Dakota in the trial court and the preliminary injunction was issued, the losing litigants had an option as operators and "the person owning, in control, or in charge of the nuisance so enjoined". They could have shown "to the satisfaction of the court or judge that the nuisance complained of is abated," in which case, the court was not required to close the place against its use for the "lewdness" which had been found to exist. It seems clear to appellants herein that, in a fact situation where the only nuisance involved would be one particular film, had testimonial evidence been given by the person "in control or in charge of the nuisance" that the same had been terminated, a proper ruling would have been such as was handed down by the trial court in *Bertrand De Blanc v. Courville*, Docket No. 46743-1/2,

15th Judicial District Court, LaFayette Parish, La., which abated the film, "The Minx," under a similar Louisiana statute. That court held as follows:

> "It is further ordered that the rule of the District Attorney be made absolute and accordingly that the writ of injunction issued be perpetuated and that the building known as Center Cinema Theatre and the contents thereof, to-wit, the motion picture film known as The Minx are declared to be a nuisance and that the defendants, Ogden Perry Theatre, Inc., and Jules J. Courville, be and they are enjoined and restrained from committing and permitting further acts of obscenity as defined by RS 14:106, including the showing of the motion picture film The Minx in said building.
>
> "It is further ordered that an order of abatement be issued ordering the effectual closing of the building and the premises housing said building and prohibiting its use for any purpose for a period of one year from the date of the filing of this suit *unless all costs of these proceedings be paid and a bond be furnished in accordance with the law and approved by the court.*
>
> "It is further ordered in compliance with the statute that the said defendants be permanently enjoined and restrained from carrying on and conducting such a nuisance anywhere in the State of Louisiana. . . ." (our emphasis.)

That the construction given this type of abatement statute by the LaFayette, Louisiana, trial court is a reasonable interpretation, see 20 Columbia Law Review at page 608, commenting on the intent behind such abatement statutes as originally drafted:

> "Fundamentally this legislation is preventive and not penal. For although the order for abatement prescribes the closing of the premises and the sale of the personality found therein, nevertheless the premises and property are almost invariably subject

> to release upon the payment of costs by the owner and upon filing of sufficient security to insure good behavior. In reality the injunction and abatement together merely serve to bind the defendant over to keep the peace. . . ."

By admitting that under the above set of circumstances such a ruling is proper under the statute, it does not follow therefrom that such would be proper in all cases. The clear intent of the statute is otherwise. Where, for example, the proof were that the operator had exhibited hard-core programs over a long period of time, the trial judge would be warranted in refusing to accept the testimonial evidence offered by such operator as meeting his burden of proof, i.e., "to the satisfaction of the court that the nuisance had been abated." The trial judge could properly conclude that to accept such testimony would be to perpetuate a fraud on the court. See also page 70.

*3. Ohio Revised Code Section 3767.06*

Under O.R.C. Section 3767.06, the Common Pleas Trial Court's final judgment of Nov. 30, 1972 does not foreclose the errant litigants from acquiring the right of reentry and repossession. The court order read "is ordered closed for any purpose for a period of one year unless sooner released by Order of this Court pursuant to defendant-owners fulfilling the requirements provided in Section 3767.04 of the Revised Code of Ohio." (Appendix I page 4). The trial court was following Section 3767.06 which provides the following mode of relief:

> "3767.06. Content of judgment and order. If the existence of a nuisance is admitted or established in an action as provided in Sections 3767.01 to 3767.11, inclusive, of the Revised Code. . . an order of abatement shall be entered as a part of the judgment in the case, which order shall direct the removal from the place of all personal property and contents used in conducting the nuisance, and not already released under authority of the court as pro-

> vided in Section 3767.04 of the Revised Code, and shall direct the sale of such thereof as belong to the defendants notified or appearing, in the manner provided for the sale of chattels under execution. Such order shall also require the renewal for one year of any bond furnished by the owner of the real property, as provided in Section 3767.04 of the Revised Code, or, if not so furnished shall continue for one year any closing order at the time of granting the temporary injunction, or, if no such closing order was then issued, shall include an order directing the effectual closing of the place against its use for any purpose, and keeping it closed for a period of one year *unless sooner released. The owner of any place closed and not released under bond may then appear and obtain such release in the manner and upon fulfilling the requirements provided in Section 3767.04 of the Revised Code."* (our emphasis.)

Section 3767.06 operates to allow the owner of any real property so restricted to reenter and regain possession of such real property after such order of abatement by fulfilling three requirements, namely (1) Payment of all costs incurred; (2) Filing a bond as owner of such real property conditioned that such person will immediately abate the nuisance and prevent the same from being so kept for one year from the final order of abatement, and (3) Satisfying the court of his good faith. It also allows the owner of any personal property so restricted to regain possession of the same, if claimed within 10 days after such final order of abatement, by fulfilling two requirements, namely, (1) Payment of all costs incurred, and (2) Proving, to the satisfaction of the court, innocence of any knowledge of said use thereof, and that with reasonable care and diligence he could not have known thereof.

*4. Statutory Construction*

Petitioners submit that under rudimentary principles of constitutional law, respondent is limited in its attack on the constitutionality of the statute to the specific manner in

which it was applied in this case. They cannot complain that in the future it may be unconstitutionally applied to others. See *United States v. Raines*, 362 U.S. 17, 21 (1960):

> "Kindred to these rules is the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional."

A broad attack on the Ohio Nuisance Statute, similar to that made by respondent herein, was made and rejected by a three-judge federal district court in *Grove Press, Inc. v. Flask*, 326 F. Supp. 574, 579 (Mar. 10, 1970). Vacated and remanded on other grounds in ____U.S. ____(June 21, 1973). The public policy which prevented Grove Press's broad attack should also defeat appellee's broad attack, which comes from the opposite end of the spectrum.

The construction given to the statute by the three-judge court below failed to take into consideration the fact that O.R.C. Section 3767, et seq., is a statute involving the public welfare. In the latter case, courts have always applied a liberal construction in favor of the public and a strict construction against those whose interests are adverse thereto. See 50 Ohio Jr.2d, Public Welfare, Section 24, at page 226:

> "Section 241. *Public Welfare* - It is a well established doctrine that every public statute has, or is supposed to have, as its objective some purpose or policy whereby the public welfare is served. The Legislature will be presumed to have enacted laws for the public good, and, therefore, where there is a strong interest relating to the public good or general welfare designed to be conserved by the statute, the courts, in interpreting it, apply a liberal construction in favor of the public and a strict construction against those whose interests are averse thereto. Indeed, it has been declared that in our form of government the only excuse for legislative enactment is that it will serve the public. Accordingly, in the interpretation of an ambiguous statute, a construction should be favored which is 'safe to the state' and the citizens

thereof. Where a reasonable interpretation can be given to it which will make it operate for the welfare of the general public, as distinguished from the welfare of certain individuals, groups, or classes of individuals, the courts, in construing a statute, will not impute to the legislature the unworthy purpose of having intended to enact a law for the benefit of certain individuals, groups, or classes of individuals, as distinguished from the public. . . ."

Appellants herein would ask the rhetorical question: "Of what significant difference is it, in reference to the intent of the Legislature or the public good, that only one obscene film should be played in a particular theatre for nine weeks (or indefinitely) by its pandering owners and not nine of such films for each of nine consecutive weeks?" (See, also, remarks at page 70).

Seizure and destruction or confiscation of the instruments of ascertaining wrongdoing expresses a resort to a legal remedy sanctioned by the long history of Anglo-Saxon law. *Ohio ex rel Bell v. Mahoning Valley Distributing Agency, Inc.*, 169 N.E.2d 48, at 66, affirmed in 186 N.E.2d 631, at 632; *Wisconsin v. Voshart*, 159 N.E.2d 1, 8 (June 7, 1968); Modern Constitutional Law, Antineau, Vol. 1, at Sec. 3.9. *One Lot of Emerald Cut Stones and One Ring v. U.S.* 409 U.S. 232, 34 L.Ed.2d. 438, 93 S.Ct. 489, (Dec. 11, 1972.)

The views of this Court on the seizure of obscene materials as contraband and their forfeiture as such are clearly stated in *U.S. v. Reidel*, 402 U.S. 351, 28 L.Ed. 2d 813, 91 S.Ct. 1410 (May 3, 1971), and *U.S. v. Thirty-seven (37) Photographs*, 402 U.S. 363, 28 L.Ed.2d 822, 91 S.Ct. 1400 (May 3, 1971). The decisions in *Reidel* and *Thirty-seven (37) Photographs* reaffirm the principles stated above in *Kingsley Book, Inc. v. Brown supra.*

The view of this Court on forfeitures of property used in illegal activities is set forth in *U.S. v. U.S. Coin and Currency*, 401 U.S. 715, 28 L.Ed.2d 434, 91 S.Ct. 1041, decided on April 5, 1971. In that case, Justice Harlan writing for a majority of five, stated at page 438:

"If we were writing on a clean slate, this claim that § 7302 operates to deprive totally innocent people of their property would hardly be compelling. Although it is true that the statute does not specifically state that the property shall be seized only if its owner significantly participated in the criminal enterprise, we would not readily infer that Congress intended a different meaning. Cf. Morissette v. United States, 342 US 246 96 L Ed 288, 72 S Ct 240 (1952). *However, as our past decisions have recognized, centuries of history support the Government's claim that forfeiture statutes similar to this one have an extraordinarily broad scope.* See Goldsmith-Grant Co. v. United States, 254 US 505, 65 L Ed 376, 41 S Ct 189 (1921); United States v. One Ford Coupe, 272 US 321, 71 L Ed 279, 47 S Ct. 154, 47 ALR 1025 (1926). Traditionally, forfeiture actions have proceeded upon the fiction that inanimate objects themselves can be guilty of wrongdoing. See Dobbins's Distillery v. United States, 96 US 395, 399-401, 24 LEd 637, 638 (1878); The Palmyra, 12 Wheat 1, 14, 6 L Ed 531, 535 (1827). Simply put, the theory has been that if the object is 'guilty,' it should be held forfeit. In the words of a medieval English writer, 'Where a man killeth another with the sword of John at Stile, the sword shall be forfeit as deodand, and yet no default is in the owner.' The modern forfeiture statutes are the direct descendants of this heritage, which is searchingly considered by Mr. Justice Holmes in a brilliant chapter in his book, The Common Law. The forfeiture action in the present case was instituted as an in rem proceeding in which the money itself is the formal respondent. . . ." (our emphasis.)

See also *One Lot of Emerald Cut Stones* and *One Ring v. U.S.* 409 U.S. 232, 34 L.Ed.2d. 438, 93 S.Ct. 489 (Dec. 11, 1972) where this Court said at p. 442:

"If for no other reason, the forfeiture is not barred by the Double Jeopardy Clause of the Fifth Amendment because it involves neither two criminal trials nor two criminal punishments, "Congress may impose both

a criminal and a civil sanction in respect to the same act or omission; for the Double Jeopardy Clause prohibits merely punishing twice, or attempting a second time to punish criminally for the same offense." *Helvering v. Mitchell*, supra, 303 US, at 399 82 L.Ed. 443, 63 S.Ct. 379 (1943)."

and at page 443:

(10, 11) "The § 1497 forfeiture is intended to aid in the enforcement of tariff regulations. It prevents forbidden merchandise from circulating in the United States, and, by its monetary penalty, it provides a reasonable form of liquidated damages for violation of the inspection provisions and serves to reimburse the Government for investigating and enforcement expenses. In other contexts we have recognized that such purposes characterize remedial rather than punitive sanctions. See *Helvering v. Mitchell, supra*, 303 US at 401, 82 L.Ed. 917 *Marcus v. Hess, supra*, 317 US, at 549-550, 87 L.Ed. 443, *Rex Trailer Co. v. United States*, 350 US 148, 151-154, 100 L.Ed. 149, 76 S.Ct. 219 (1956). Moreover, it cannot be said that the measure of recovery fixed by Congress in § 1497 is so unreasonable or excessive that it transforms what was clearly intended as a civil remedy into a criminal penalty. *Rex Trailer Co. v. United States, supra*, 350 US, at 154, 100 L.Ed. 149. See *Murphy v. United States*, 272 US 630, 71 L.Ed. 446, 47 S.Ct. 218 (1926); *Marcus v. Hess, supra*.

"Forfeiture of goods or their value and the payment of fixed or variable sums of money are other sanctions which have been recognized as enforceable by civil proceedings . . . . In spite of their comparative severity, such sanctions have been upheld against the contention that they are essentially criminal and subject to the procedural rules governing criminal prosecutions." *Helvering v. Mitchell, supra*, 303 US, at 400, 82 L.Ed. 917."

## CONCLUSION

Wherefore, appellants pray:

(1) That the order of judgment entered on April 20, 1973 in *Pursue Ltd. v. Lawrence S. Huffman* CIV No. 72-432 be reversed and that said action be dismissed for failure to state a claim upon which federal relief can be based.

(2) That *State of Ohio ex rel Lawrence S. Huffman v. William H. Dakota et. al.* 72 CIV 0326 be ordered remanded back to the Court of Common Pleas of Allen County, Ohio to permit appellants to execute the final judgment of said court, entered on Nov. 30, 1972.

August 14, 1973 Respectfully Submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on this 14 day of August, 1973, copies of the within Jurisdictional Statement were air-mailed, postage prepaid, to the below listed parties to the proceedings. I further certify that all parties required to be served have been served.

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## Appendix A

Opinion and Order of Judgment of the Three-Judge District Court (Celebrezze, Circuit Judge, and Young and Walinski, District Judges) filed in the United States District Court for the Northern District of Ohio, Western Division in *Pursue Ltd., v. Lawrence S. Hoffman et al.*, No. C 72-432 on Apr. 20, 1973. ..... Page 3-12

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

FILED
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CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO

PURSUE, LTD., etc., )

Plaintiff, )

v. ) No. C 72-432

LAWRENCE S. HUFFMAN, etc., et al., ) OPINION AND ORDER

Defendants. )

Before: CELEBREZZE, Circuit Judge, and YOUNG and WALINSKI, District Judges.

CELEBREZZE, Circuit Judge:

This is a suit under 42 U.S.C. § 1983 seeking injunctive relief and declaratory judgment against the assertedly unconstitutional provisions of the Ohio nuisance statute, O.R.C. §§ 3767.01, et seq., as it pertains to the exhibition of obscene movies.

On September 18, 1972, Defendant Huffman, Prosecutor of Allen County, Ohio, filed a civil complaint in the Allen County Court of Common Pleas, seeking a temporary injunction pursuant to O.R.C. § 3767.04 and a permanent injunction pursuant to O.R.C. § 3767.06 closing the Cinema I Theatre in Lima, Ohio, on the grounds that obscene movies were being shown therein in violation of O.R.C. §§ 3767.01 and .02. The Common Pleas Court conducted a hearing on Defendants' motion for a temporary injunction, at which the owners and William Dakota, then operator of the theatre, were represented by counsel and four motion picture films subpoened by Defendant

were reviewed. Finding that a nuisance existed on the premises, the Court on October 24, 1972, entered an order closing the theatre for an indefinite period, apparently pursuant to O.R.C. § 3767.04.

On October 25, 1972, William Dakota filed a complaint in this Court under case No. C 72-384, seeking a temporary restraining order against execution of the Common Pleas Court's judgment. By an Opinion and Order dated November 1, 1972, this Court stayed the state court injunction, but only to the extent that that injunction forbadethe showing of films which had not been held to be obscene in a prior adversary hearing.

The Common Pleas Court reconvened for the combined purpose of conducting a prior adversary hearing on films not yet reviewed and considering Defendants' application for a permanent injunction against the theatre. Photographs from 12 additional movies which had been shown at the theatre were reviewed. In a judgment entered November 30, 1972, the Court found in part as follows:

> "That defendant, William H. Dakota, has engaged in a course of conduct of displaying motion picture films at said Cinema I Theater which are obscene as (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value, all three elements coalescing."

Pursuant to O.R.C. § 3766.06, the theatre was therefore ordered closed "for any purpose for a period of one year unless sooner released by order of [the] Court pursuant to defendant-owners fulfilling the requirements provided in Section 3767.04 of the Revised Code of Ohio."

Plaintiff Pursue, Ltd.,[1] a Delaware corporation and assignee of William Dakota's leasehold interest in the theatre as of November 17, 1972, filed the present complaint in this Court seeking a temporary restraining order and preliminary and permanent injunctive relief against the above judgment of the Common Pleas Court and declaratory judgment respecting the asserted unconstitutionality of the Ohio statute. By an order entered December 1, 1972, a single judge of this Court stayed the judgment of the Common Pleas Court pending the convening of this three-judge Court, except insofar as that judgment applies to films which have been declared obscene in a prior adversary hearing.

The complaint lodges two general attacks upon the

1. Although the final judgment of the Common Pleas Court was in part directed against William Dakota, predecessor to Plaintiff in the leasehold interest in the theatre, we find no difficulty in recognizing Plaintiff's standing to bring the present suit. The Ohio nuisance statute, O.R.C. § 3767.01, et seq., is primarily directed against property on which a nuisance is maintained. Accordingly, the Common Pleas Court's final judgment not only enjoined William Dakota and the other state defendants from conducting the nuisance, but also ordered the theatre itself closed. When the state court's judgment closing the theatre was entered, Plaintiff herein had clearly succeeded Dakota as leaseholder and operator of the theatre. We therefore find that Plaintiff clearly has standing to bring the present action, notwithstanding the fact that it was not a party to the state court proceedings.

constitutionality of the Ohio nuisance statute, O.R.C. § 3767.01, et seq. In its first general challenge to the statute, Plaintiff contends that the definition of "nuisance" found in Section 3767.01 respecting "... any place, in or upon which lewd, indecent, lascivious, or obscene films ... are exhibited..." is overly broad and void for vagueness.

In Grove Press, Inc. v. Flask, 326 F.Supp. 574, 578 (N.D. Ohio 1968) (appeal No. 70-1 pending before the Supreme Court), a three-judge court reviewed and rejected a similar challenge against the language of Section 3767.01. There, relying on the Supreme Court's decision in Roth v. United States, 354 U.S. 476 (1957), the Court held that language of Section 3767.01 was not overly broad so as to constitute a denial of due process. In Grove Press the Court assumed that Ohio's courts and prosecutors would give effect to the United States Supreme Court's limitations respecting obscenity and noted that the Supreme Court of Ohio had in fact done so in State v. Wages, 7 Ohio St. 2d 136 (1966). Significantly, the above-quoted portion of the Common Pleas Court's final judgment in the present case reflects the standards set forth in A Book Named "John Clelland's Memoirs of a Woman of Pleasure v. Massachusetts, 383 U.S. 413 (1966), further justifying the deference which we must grant to the state courts in applying the obscenity provisions of Section 3767.01.

Relying on the decision in Grove Press, Inc. v. Flask, supra

326 F.Supp. 578, we hold that the obscenity language of Section 3767.01 is not overly broad or void for vagueness.

As its second general attack upon the Ohio nuisance statute, Plaintiff contends that O.R.C. §§ 3767.04 and 3767.06 are unconstitutional in that they authorize a prior restraint on the exercise of First Amendment rights. Section 3767.06[2] provides in pertinent part that upon a determination that a nuisance exists upon a given premises, a common pleas court shall order the premises closed "for any purpose" for a period of one year unless the owner obtains a release from such order by demonstrating that the nuisance has been abated and posting a bond

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2. The relevant language of Section 3767.06 reads as follows:

"If the existence of a nuisance is admitted or established in an action as provided in sections 3767.01 to 3767.11, inclusive, of the Revised Code, or in a criminal proceeding, an order of abatement shall be entered as a part of the judgment in the case, which order shall direct the removal from the place of all personal property and contents used in conducting the nuisance, and not already released under authority of the court as provided in section 3767.04 of the Revised Code, and shall direct the sale of such thereof as belong to the defendants notified or appearing, in the manner provided for the sale of chattels under execution. Such order shall also require the renewal for one year of any bond furnished by the owner of the real property, as provided in section 3767.04 of the Revised Code, or, if not so furnished shall continue for one year any closing order issued at the time of granting the temporary injunction, or, if no such closing order was then issued, shall include an order directing the effectual closing of the place against its use for any purpose, and keeping it closed for a period of one

conditioned on the nonrecurrence of the nuisance. Thus, upon a determination that as few as one or two films shown at a given theatre are obscene, the theatre can be ordered closed under this Section for a period of one year regardless of the nature of any other films which the owner or operator may have intended to show during that period, with the burden falling on the owner to come into court and prove the nonobscenity of any such other films.

Section 3767.04 provides that pending a final decision on an application for a permanent injunction, a common pleas court can order the closing of a given premises for certain purposes upon which a nuisance has been found to exist. To the extent that Section 3767.04 authorizes a court order closing a theatre without a prior adversary hearing on every film which is to be barred, the court will examine its constitutionality.

We agree with Plaintiff's argument that this provision under Section 3767.06 constitutes an overly broad prior restraint on its

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2 - continued:

> year unless sooner released. The owner of any place closed and not released under bond may then appear and obtain such release in the manner and upon fulfilling the requirements provided in section 3767.04 of the Revised Code...."

First Amendment rights.[3] We recognize that the Supreme Court's decisions in Near v. Minnesota, 283 U.S. 697 (1931), Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971), and New York Times v. United States, 403 U.S. 713 (1971), did not deal with prior restraints respecting allegedly obscene materials. Nonetheless, in Marcus v. Search Warrant, 367 U.S. 717, 731 (1961), the Supreme Court noted that "a State is not free to adopt whatever procedures it pleases for dealing with obscenity ... without regard to the possible consequences for constitutionality protected speech." See also Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 66 (1963).

In Marcus v. Search Warrant, supra, the Court struck down a state procedure under which a single police officer, operating under a search warrant, was permitted to conduct a mass seizure of materials which he alone deemed to be obscene, in the absence of a prior adversary hearing. See also A Quantity of Copies of Books v. Kansas, 378 U.S. 205 (1964). Similarly, in Grove Press, Inc. v. Flask, 326 F.Supp. 574, 580-82 (N.D. Ohio 1970), the court declared unconstitutional a city

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3. That a corporation such as Plaintiff here has First Amendment rights appears to be well established. See New York Times v. United States, 403 U.S. 713 (1971); Bantam Books, 372 U.S. 58 (1963). Cf. Grosjean v. American Press Co., Inc., 297 U.S. 233, 244 (1936).

ordinance which permitted the seizure of allegedly obscene materials without a prior adversary hearing. Significantly, in Grove Press the Court rejected a constitutional attack upon the penalty provisions of the Ohio nuisance statute since the statute did require a prior adversary hearing respecting the obscenity of the single film involved in that case. See 326 F.Supp. at 579-80.

Unlike the Grove Press case, the present suit does not challenge the Ohio nuisance statute as applied to a single motion picture which has been adjudged obscene in a prior adversary hearing. Rather, we are here faced with an injunction under that statute which bars the showing of any films and closes the theatre "for any purpose" for a period of one year. Although a prior adversary hearing was conducted with respect to some 16 films in the theatre's possession prior to the state court's final judgment, the statute provides for no such hearing on any other films which the operator may have intended to show during the one-year period.

No less than the injunctive penalties imposed under the state nuisance statute in Near v. Minnesota, supra, the Common Pleas Court's order closing the theatre for one year constitutes an impermissible prior restraint in that no adequate safeguards -- in the form of prior adversary hearings -- are afforded for materials which might be non-obscene and thus protected by the First Amendment. See Bantam Books, Inc.

v. Sullivan, 372 U.S. 58, 65-66 (1963). Compare Kingsley Books, Inc. v. Brown, 354 U.S. 436, 445 (1957). The invalidity of this procedure is not removed by the fact that under the statute Plaintiff can obtain a release from the court's order by satisfying the court that the nuisance has been abated. Such a procedure which places upon the individual or corporation the burden of proving that matter which he intends to distribute or exhibit is protected by the First Amendment is "but a step [toward] a complete system of censorship." Near v. Minnesota, supra, 283 U.S. at 721.

We conclude that the provision of O.R.C. § 3767.06 authorizing a state court to order the closing of a premises upon which a nuisance has been found to exist violates the Fourteenth Amendment when, as in the present case, that sanction precludes the showing of films which have not been found to be obscene in a prior adversary hearing and which thus might be protected by the First Amendment. We further conclude that the comparable provision in O.R.C. § 3767.04, authorizing a state court to close a premises pending a ruling on an application for a permanent injunction is similarly unconstitutional to the extent that it precludes the showing of films which have

not been determined to be obscene in a prior adversary hearing.

Defendants are therefore enjoined from executing that portion of the Allen County Common Pleas Court's judgment of November 30, 1972, which orders the closing of Plaintiff's theatre pursuant to O.R.C. § 3767.06. Having ruled upon the constitutionality of the state statutes, this three-judge court is dissolved and the case is remanded to Judge Nicholas J. Walinski for further proceedings under Plaintiff's claim for damages as set forth in the amended complaint.

Anthony J. Celebrezze

Don J. Young

Nicholas J. Walinski

In conformity with Rule 77 (d) F.R.C.P. please take notice that the following order of judgment was entered in this court on APR 20 1973

Dominic J. Cimino, Clerk

# Appendix B

Ohio Revised Code, Sections 3767.01 thru 3767.11


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# CHAPTER 3767: NUISANCES

Section

[DISORDERLY HOUSES]

3767.01 Definitions.
3767.02 Nuisance.
3767.03 Abatement of nuisance, bond.
3767.04 Procedure in injunction action.
3767.05 Priority of action, evidence, costs.
3767.06 Content of judgment and order.
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3767.08 Tax when permanent injunction issues, payment.
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3767.10 Lease void if building used for lewd purposes.
3767.11 Procedure when nuisance established in criminal proceeding.

[OTHER NUISANCES]

3767.12 Keeping a resort for thieves; prohibition.
3767.13 Prohibitions.
3767.14 Prohibition against throwing refuse, oil, or filth into lakes, streams, or drains.
3767.15 Fine and costs are a lien.
3767.16 Prohibition against deposit of dead animals and offal upon land or water.
3767.17 Prohibition against obstructing township or county ditch.
3767.18 Prohibition against defiling spring or well.
3767.19 Prohibition against nuisances when near state institutions.
3767.20 Disposal of garbage, refuse, or junk on public ways.
[3767.20.1] 3767.201 Destruction or removal of barriers along limited access highways prohibited; vehicles to enter and leave at designated intersection.
3767.21 Transportation of junk, refuse, or garbage upon public ways.
3767.22 Exceptions.
3767.23 Prosecution of corporations for nuisances; abatement.
3767.24 Contempt proceedings.
3767.25 Venue.
3767.26 Judgment for fine and costs.
3767.27 Inspector of nuisances.
3767.28 Powers and duties of inspector.
3767.29 Abandoned refrigerators.
3767.30 Picketing during funeral or burial services.
3767.31 Deposit of harmful objects in recreational waters prohibited.
3767.32 Disposal of garbage and other waste along streams, prohibited.
3767.33 Authorization of disposal of materials; injunction against disposal.
3767.99 Penalties.

## [DISORDERLY HOUSES]

### § 3767.01 Definitions.

As used in all sections of the Revised Code relating to nuisances:

(A) "Place" includes any building, erection, or place or any separate part or portion thereof or the ground itself;

(B) "Person" includes any individual, corporation, association, partnership, trustee, lessee, agent, or assignee;

(C) "Nuisance" means that which is defined and declared by statutes to be such and also means any place in or upon which lewdness, assignation, or prostitution is conducted, permitted, continued, or exists, or any place, in or upon which lewd, indecent, lascivious, or obscene films or plate negatives, film or plate positives, films designed to be projected on a screen for exhibition films, or glass slides either in negative or positive form designed for exhibition by projection on a screen, are photographed, manufactured, developed, screened, exhibited, or otherwise prepared or shown, and the personal property and contents used in conducting and maintaining any such place for any such purpose. This chapter shall not affect any newspaper, magazine, or other publication entered as second class matter by the post-office department.

HISTORY: GC § 6212-1; 107 v 514; 120 v 230; 129 v 1400. Eff 10-11-61.

**Cross-References to Related Sections**

Penalty, RC § 3767.99(A).
Criminal penalties, RC § 2903.10 et seq.
Employment agency not to send applicant to, RC § 4143.12.
Houses of ill-fame, power of municipality to suppress, RC § 715.52
Not to be kept near certain places, RC § 4399.11.
Selling intoxicating liquors, when a nuisance, RC § 4301.73 et seq.

**Comparative Legislation**

Prostitution—abatement of nuisance:
Cal.—Deering, Penal § 315.
Ill.—Rev Stat, 1965, ch 100½, § 1 et seq.
Ky.—KRS § 233.010.
Mass.—Ann Laws, ch 139, § 4.
Mich.—Compiled Laws, § 600.2901 et seq.
N.Y.—Consol Laws, Penal § 230.00 et seq.
Pa.—Purdon's Stat, tit 68, § 467.
Tenn.—Code Ann, § 23-301.
W. Va.—Code 1966, § 61-9-1 et seq.

**Research Aids**

Page: Equity § 3; Nuisance §§ 10, 23 et seq., 34 et seq.
O-Jur2d: Disorderly Houses § 6; Nuisances § 18; Theaters §§ 15, 22.
Am Jur2d: Disorderly Houses §§ 1-11.

**ALR**

Pigs, keeping, 2 ALR3d 931.
Poultry, keeping, 2 ALR3d 965.
Motorbus or truck terminal as nuisance. 2 ALR3d 1072.

**Law Review**

Nuisance in a nutshell. Howard L. Oleck. 5 ClevMLRev 145.

**CASE NOTES AND OAG**

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Abandoned mine defined, 3
Delegation of power, illegal or improper, when, 1
Municipal corporation, not person within statute, 2
Owner of land and lessee, when jointly guilty of maintaining nuisance, 4
Owner of land, sole responsibility, when, 5

1. As result of the decision in this section by which a prohibition is introduced into RC § 2915.02, there is an improper and illegal delegation of power to administrative officials: Cincinnati v. King, 11 OO (2d) 453 (MC).

2. The term "person," as defined in this section does not include municipal corporations and such [illegible] and hence, by the terms of RC § 3767.03 as well as RC § 3767.01 et seq., RC § 3767.03 is not a statute of nuisances; therefore, a nuisance inspector has no power over municipal corporations under this chapter. 1958 OAG No 3017.

3. Neither the Ohio statutes nor case decisions contain a legal definition as to what is an abandoned mine, but there is no reason to suppose that the term should encompass anything other than its usual connotation. 1959 OAG No 3221.

4. When RC § 6111.04, which, with certain exceptions, declares the act of polluting any of the waters of the state to be a public nuisance, is read in connection with this section and RC § 3767.02, it is apparent that both the owner and lessee of the leased premises [illegible] and both are responsible for the abatement thereof. 1959 OAG No 3221.

5. When a nuisance is created on leased premises by a lessee under an express lease, the owner of the land is solely responsible for its abatement after the expiration of the lease. 1959 OAG No 3221.

## § 3767.02 Nuisance. (GC § 6212-2)

Any person, who uses, occupies, establishes, or conducts a nuisance, or aids or abets therein, and the owner, agent, or lessee of any interest in any such nuisance together with the persons employed in or in control of any such nuisance by any such owner, agent, or lessee is guilty of maintaining a nuisance and shall be enjoined as provided in sections 3767.03 to 3767.06, inclusive, of the Revised Code.

HISTORY: GC § 6212-2; 107 v 514, § 2. Eff 10-1-53.

Penalty, RC § 3767.99(A).

**Research Aids**

O-Jur2d: Disorderly Houses § 6
Am-Jur2d: Disorderly Houses § 10

### CASE NOTES AND OAG

See also case notes 4, 5 under RC § 3767.01, 1 under RC § 3767.07, 23 under RC § 3767.13.

1. The burning of combustible waste material on the lakefront dump by the city of Cleveland with the emission of acrid fumes, noisome smoke and offensive fly-ash constitutes a nuisance per se and is in violation of the statutes of Ohio and the ordinances of the city of Cleveland, and, where other methods of disposing of such material are available and can be made to work, the continued burning of such material, on the claim that an emergency exists, will not be permitted: Neubauer v. Cleveland, 105 App 258, 6 OO(2d) 69, 145 NE(2d) 315.

2. An emission of smoke becomes a nuisance only when it is injurious to the health, damaging to property or annoying to the inhabitants of a locality, and an ordinance of a city making the emission of dense smoke per se a nuisance is invalid: Cleveland v. Malm, 5 NP 203, 7 OD 124.

3. A prize fight when held in public is a common nuisance and injunction lies to prevent such contest, even though its commission would afterwards be punished as a crime: State ex rel Attorney General v. Hobart, 8 NP 246, 11 OD 166.

## § 3767.03 Abatement of nuisance; bond. (GC § 6212-3)

Whenever a nuisance exists, the attorney general, the prosecuting attorney of the county in which such nuisance exists, or any person who is a citizen of such county may bring an action in equity in the name of the state, upon the relation of such attorney general, prosecuting attorney, or person, to abate such nuisance and to perpetually enjoin the person maintaining the same from further maintenance thereof. If such action is instituted by a person other than the prosecuting attorney, or attorney general, the complainant shall execute a bond to the person against whom complaint is made, with good and sufficient surety to be approved by the court or clerk thereof, in the sum of not less than five hundred dollars to secure to the party enjoined the damages he may sustain if such action is wrongfully brought, not prosecuted to final judgment, or is dismissed, or is not maintained, or if it is finally decided that the injunction ought not to have been granted. The party thereby aggrieved by the issuance of such injunction shall have recourse against said bond for all damages suffered, including damages to his property, person, or character and including reasonable attorney's fees incurred by him in making defense to said action.

HISTORY: GC § 6212-3; 107 v 514, § 3. Eff 10-1-53.

**Cross-References to Related Sections**

Penalty, RC § 3767.99(A).

See RC § 3767.02 which refers to RC § 3767.03 et seq.

See RC §§ 3767.04, 3767.05 which refer to this section.

**Research Aids**

Page: Nuisance § 27
O-Jur2d: Disorderly Houses §§ 6, 9, 10, Theaters § 15
Am-Jur2d: Disorderly Houses §§ 40-47

**ALR**

Gun club, or shooting gallery or range, as nuisance. 26 ALR3d 661.

**Law Review**

Nuisance in a nutshell. Howard L. Oleck. 5 ClevMLRev 148.

### CASE NOTES AND OAG

See also case note under RC § 3767.07.

1. That portion of RC § 4301.73, prescribing who may bring an action to enjoin the nuisance defined by such section is a special statutory provision which applies to a specific subject matter and constitutes an exception to the statutory provision set forth in RC § 3767.03, prescribing who may bring an action to abate and enjoin nuisances defined under the general provisions of RC § 3767.01, and such special statutory provision controls over the general statutory provision: State ex rel MacDonald v. Shawnee Country Club, 20 OApp(2d) 37, 49 OO(2d) 61, 251 NE(2d) 616.

2. An injunction will not be issued in an action brought by the prosecuting attorney where the operation of a garbage and waste disposal plant does not constitute a public nuisance: State ex rel Hover v. Rumpke, 69 OO 25, 130 NE 2d) 243 (App).

3. Where a tree is located on private property along a township road, but dead branches of the tree overhang the road and are dangerous to travelers on the road, the property owner has the primary duty

to remove the dangerous condition. Although the board of township trustees is also obligated to remove said dangerous condition and may have to institute nuisance abatement proceedings under this section to compel the property owner to remove the danger, or the board may request that the director of agriculture act pursuant to RC § 927.22 to alleviate the dangerous condition: 1961 OAG No 2220.

4. Where in a municipal corporation a dead tree is located on private property but overhangs a public street so as to cause danger to users of the street, the owner of the property has the primary duty to remove the dangerous condition but the municipal corporation also has a responsibility to protect users of the street, and the municipal corporation may institute nuisance abatement proceedings under this section to compel the property owner to remove the dangerous condition, or may request that the director of agriculture act pursuant to RC § 927.22 to alleviate the dangerous condition: 1961 OAG No 2210.

**§ 3767.04 Procedure in injunction action.** (GC § 6212-4)

The action, provided in section 3767.03 of the Revised Code, shall be brought in the court of common pleas of the county in which the property is located. At the commencement of the action a verified petition alleging the facts constituting the nuisance shall be filed in the office of the clerk of the court of common pleas.

After the filing of the petition, application for a temporary injunction may be made to the court or a judge thereof who shall grant a hearing within ten days after the filing. Where such application for a temporary injunction is made, the court or judge thereof may, on application of the complainant, issue an ex parte restraining order, restraining the defendant and all other persons from removing or in any manner interfering with the personal property and contents of the place where such nuisance is alleged to exist until the decision of the court or judge granting or refusing such temporary injunction and until the further order of the court thereon. The restraining order may be served by handing to and leaving a copy of such order with any person in charge of such place or residing therein, or by posting a copy thereof in a conspicuous place at or upon one or more of the principal doors or entrances to such place, or by both such delivery and posting. The officer serving such restraining order shall forthwith make and return into court an inventory of the personal property and contents situated in and used in conducting or maintaining such nuisance. Any violation of such restraining order is a contempt of court, and where such order is posted, mutilation or removal thereof, while the same remains in force, is a contempt of court, provided such posted order contains therein a notice to that effect.

A copy of the complaint, together with a notice of the time and place of the hearing of the application for a temporary injunction, shall be served upon the defendant at least five days before such hearing. If the hearing is then continued at the instance of any defendant, the temporary writ as prayed shall be granted as a matter of course. If upon hearing the allegations of the petition are established to the satisfaction of the court or judge, the court or judge shall issue a temporary injunction without additional bond restraining the defendant and any other person from continuing the nuisance. If at the time of granting a temporary injunction, it further appears that the person owning, in control, or in charge of the nuisance so enjoined had received five days' notice of the hearing and unless such person shows to the satisfaction of the court or judge that the nuisance complained of is abated, or that such person proceeded forthwith to enforce his rights under section 3767.10 of the Revised Code, the court or judge shall forthwith issue an order closing the place against its use for any purpose of lewdness, assignation, or prostitution until final decision is rendered on the application for a permanent injunction. Such order shall also continue in effect for such further period the restraining order above provided if already issued, or, if not so issued, shall include such an order restraining for such period the removal or interference with the personal property and contents located therein. Such restraining order shall be served and the inventory of such property shall be made and filed as provided in this section. The owner of any real or personal property closed or restrained or to be closed or restrained may appear between the filing of the petition and the hearing on the application for a permanent injunction and, upon payment of all costs incurred and upon the filing of a bond by the owner of the real property with sureties to be approved by the clerk in the full value of the property to be ascertained by the court, or, in vacation, by the judge, conditioned that such owner will immediately abate the nuisance and prevent the same from being established or kept until the decision of the court or judge is rendered on the application for a permanent injunction, then the court, or judge in vacation, if satisfied of the good faith of the owner of the real property and of innocence on the part of any owner of the personal property of any knowledge of the use of such personal property as a nuisance and that, with reasonable care and diligence, such owner could not have known thereof, shall deliver such real or personal property, or both, to the respective owners thereof, and discharge or refrain from issuing at the time of the hearing on the application for the temporary injunction any order closing such real property or restraining the removal or interference with such personal property. The release of any real or personal property under this section shall not relieve it from any judgment, lien, penalty, or liability to which it may be subjected.

HISTORY: GC § 6212-4; 107 v 314, § 4. Eff 10-1-53.

Cross-References to Related Sections
Penalty, RC § 3767.99(A).
See RC §§ 3767.03, 3767.05 which refer to this section.

Outlines of Procedure
Abatement of houses of prostitution, Leyshon No. 153; Temporary restraining order, No. 184.

Research Aids
Page: Nuisance §§ 26, 29, 31
O-Jur2d: Disorderly Houses §§ 7, 8, 13
Am-Jur2d: Injunctions §§ 13, 14

## § 3767.05 Priority of action; evidence; costs. (GC § 6212-5)

The action, provided for in sections 3767.03 and 3767.04 of the Revised Code, shall be set down for trial at the first term of the court and shall have precedence over all other cases except crimes, election contests, or injunctions. In such action, evidence of the general reputation of the place or an admission or finding of guilt of any person under the criminal laws against prostitution, lewdness, or assignation at any such place is admissible for the purpose of proving the existence of said nuisance and is prima-facie evidence of such nuisance and of knowledge of and of acquiescence and participation therein on the part of the person charged with maintaining said nuisance. If the complaint is filed by a person who is a citizen of the county it shall not be dismissed except upon a sworn statement by the complainant and his attorney, setting forth the reason why the action should be dismissed and the dismissal approved by the prosecuting attorney in writing or in open court. If the judge is of the opinion that the action ought not to be dismissed, he may direct the prosecuting attorney to prosecute said action to judgment at the expense of the county, and if the action is continued more than one term of court, any person who is a citizen of the county, or has an office therein, or the attorney general or the prosecuting attorney, may be substituted for the complainant and prosecute said action to judgment. If the action is brought by a person who is a citizen of the county and the court finds that there were no reasonable grounds or cause for said action, the costs may be taxed to such person. If the existence of the nuisance is established upon the trial, a judgment shall be entered which shall perpetually enjoin the defendant and any other person from further maintaining the nuisance at the place complained of and the defendant from maintaining such nuisance elsewhere.

HISTORY: GC § 6212-5; 107 v 514 (516), § 5. Eff 10-1-55.

Cross-References to Related Sections
Penalty, RC § 3767.99(A).

Research Aids
O-Jur2d: Disorderly Houses §§ 7, 11-14
Am-Jur2d: Disorderly Houses §§ 42, 43

## § 3767.06 Content of judgment and order. (GC § 6212-6)

If the existence of a nuisance is admitted or established in an action as provided in sections 3767.01 to 3767.11, inclusive, of the Revised Code, or in a criminal proceeding, an order of abatement shall be entered as a part of the judgment in the case, which order shall direct the removal from the place of all personal property and contents used in conducting the nuisance, and not already released under authority of the court as provided in section 3767.04 of the Revised Code, and shall direct the sale of such thereof as belong to the defendants notified or appearing, in the manner provided for the sale of chattels under execution. Such order shall also require the renewal for one year of any bond furnished by the owner of the real property, as provided in section 3767.04 of the Revised Code, or, if not so furnished shall continue for one year any closing order issued at the time of granting the temporary injunction, or, if no such closing order was then issued, shall include an order directing the effectual closing of the place against its use for any purpose, and keeping it closed for a period of one year unless sooner released. The owner of any place closed and not released under bond may then appear and obtain such release in the manner and upon fulfilling the requirements provided in section 3767.04 of the Revised Code. The release of the property under this section shall not release it from any judgment, lien, penalty, or liability to which it may be subject. Owners of unsold personal property and contents so seized must appear and claim the same within ten days after such order of abatement is made and prove innocence, to the satisfaction of the court, of any knowledge of said use thereof and that with reasonable care and diligence they could not have known thereof. Every defendant in the action is presumed to have had knowledge of the general reputation of the place. If such innocence is established, such unsold personal property and contents shall be delivered to the owner, otherwise it shall be sold as provided in this section. For removing and selling the personal property and contents, the officer shall be entitled to charge and receive the same fees as he would for levying upon and selling like property on execution; and for closing the place and keeping it closed, a reasonable sum shall be allowed by the court.

HISTORY: GC § 6212-6; 107 v 514 (517), § 6. Eff 10-1-55.

Cross-References to Related Sections
Penalty, RC § 3767.99(A).
See RC §§ 3767.08, 3767.11 which refer to this section.

Research Aids
Page: Nuisance § 31
O-Jur2d: Disorderly Houses § 13
Am-Jur2d: Disorderly Houses §§ 43, 45

**ALR**

Punitive damages in actions based on nuisance. 31 ALR3d 1346.

**CASE NOTES AND OAG**

1. An order for the abatement of a house of prostitution, under this section, is not a punishment of the criminal offense, under GC § 12031 (RC § 2903.14). Wind v. State, 102 Os 62, 130 NE 35.

**§ 3767.07 Court shall punish offender for violation of injunction or order.** (GC § 6212-8)

In case of the violation of any injunction or closing order, granted under sections 3767.01 to 3767.11, inclusive, of the Revised Code, or of a restraining order or the commission of any contempt of court in proceedings under such sections, the court or, in vacation, a judge thereof, may summarily try and punish the offender. The trial may be had upon affidavits or either party may demand the production and oral examination of the witnesses.

**HISTORY:** GC § 6212-8; 107 v 514 (518), § 8. Eff 10-1-53.

**Cross-References to Related Sections**

Penalty, RC § 3767.99(A).

See RC § 3767.11 which refers to RC § 3767.07 et seq.

**Research Aids**

Page: Nuisances § 31
O-Jur2d: Disorderly Houses § 13
Am-Jur2d: Injunctions §§ 336-340

**CASE NOTES AND OAG**

1. The provisions of this section for punishing as contempt a violation of an injunction closing a house of prostitution do not violate the right of trial by jury. Such power is an inherent power of the court: Wind v. State, 102 Os 62, 130 NE 35.

**§ 3767.08 Tax when permanent injunction issues; payment.** (GC § 6212-9)

Whenever a permanent injunction issues against any person for maintaining a nuisance, there shall be imposed upon said nuisance and against the person maintaining the same a tax of three hundred dollars. Such tax may not be imposed upon the personal property or against the owner thereof who has proved innocence as provided in section 3767.06 of the Revised Code, or upon the real property or against the owner thereof who shows to the satisfaction of the court or judge thereof at the time of the granting of the permanent injunction, that he has, in good faith, permanently abated the nuisance complained of. The imposition of said tax shall be made by the court as a part of the proceeding and the clerk of said court shall make and certify a return of the imposition of said tax thereon to the county auditor, who shall enter the same as a tax upon the property and against the person upon which or whom the lien was imposed as and when other taxes are entered, and the same shall be and remain a perpetual lien upon all property, both personal and real, used for the purpose of maintaining said nuisance except as excepted in this section until fully paid. Any such lien imposed while the tax books are in the hands of the auditor shall be immediately entered thereon. The payment of said tax shall not relieve the persons or property from any other taxes. The provisions of the laws relating to the collection of taxes in this state, the delinquency thereof, and sale of property for taxes shall govern in the collection of the tax prescribed in this section in so far as the same are applicable, and the said tax collected shall be applied in payment of any deficiency in the costs of the action and abatement on behalf of the state to the extent of such deficiency after the application thereto of the proceeds of the sale of personal property, and the remainder of said tax, together with the unexpended portion of the proceeds of the sale of personal property shall be distributed in the same manner as fines collected under section 2905.14 of the Revised Code.

**HISTORY:** GC § 6212-9; 107 v 514 (518), § 9. Eff 10-1-53.

**Cross-References to Related Sections**

Penalty, RC § 3767.99(A).

See EC § 3767.09 which refers to this section.

**Research Aids**

O-Jur2d: Disorderly Houses § 8
Am-Jur2d: Disorderly Houses §§ 38, 39

**§ 3767.09 Tax shall be imposed against owner of property.** (GC § 6212-10)

When a nuisance is found to exist in any proceeding under sections 3767.01 to 3767.11, inclusive, of the Revised Code, and the owner or agent of such place wherein the same has been found to exist was not a party to such proceeding, and did not appear therein, the tax of three hundred dollars, imposed under section 3767.05 of the Revised Code, shall, nevertheless, be imposed against the persons served or appearing and against the property as set forth in this section. Before such tax is enforced against such property, the owner or agent thereof shall have appeared therein or shall be served with summons therein, and existing laws, regarding the service of process, shall apply to service in proceedings under sections 3767.01 to 3767.11, inclusive, of the Revised Code. The person in whose name the real estate affected by the action stands on the books of the county auditor for purposes of taxation is presumed to be the owner thereof, and in case of unknown persons having or claiming any ownership, right, title, or interest in property affected by the action, such may be made parties to the action by designating them in the petition as "all other persons unknown claiming any ownership, right, title, or interest in the property described in the action." Service thereon may be had by publication in the manner prescribed in sections 2703.14 to 2703.19, inclusive, of the Revised

Code. Any person having or claiming such ownership, right, title, or interest, and any owner or agent in behalf of himself or such owner may make defense thereto and have trial of his rights in the premises by the court; and if said cause has already proceeded to trial or to findings and judgment, the court shall, by order, fix the time and place of such further trial and shall modify, add to, or confirm such findings and judgment. Other parties to said action shall not be affected thereby.

**HISTORY: GC § 6212-10; 107 v 514 (519), § 10. Eff 10-1-53.**

Penalty, RC § 3767.99(A).

**Research Aids**

O-Jur2d: Disorderly Houses § 6
Am-Jur2d: Disorderly Houses §§ 38, 39

## § 3767.10 Lease void if building used for lewd purposes. (GC § 6212-12)

If a tenant or occupant of a building or tenement, under a lawful title, uses such place for the purposes of lewdness, assignation, or prostitution, such use makes void the lease or other title under which he holds, at the option of the owner, and, without any act of the owner, causes the right of possession to revert and vest in such owner, who may without process of law make immediate entry upon the premises.

**HISTORY: GC § 6212-12; 107 v 514 (519), § 12. Eff 10-1-53.**

**Cross-References to Related Sections**

Penalty, RC § 3767.99(A).
See RC § 3767.04 which refers to this section.

**Research Aids**

**Page:** Intox. Liq. § 42; Land. and Ten. § 82
O-Jur2d: Disorderly Houses § 5
**Am-Jur2d:** Land. & Ten. §§ 1043, 1044

**ALR**

Construction and application of statute authorizing forfeiture or termination of lease because of tenant's illegal use of premises. 100 ALR2d 465.

### CASE NOTES AND OAG

1. A tenant who makes improvements to property, which improvements are to revert to the landlord at the expiration of the term, may not recover for the value of such improvements on the theory of unjust enrichment where the lease is forfeited because of the unlawful use of the property by the tenant. State ex rel Hover v. Preston W. Campbell Co., 51 OO 317, 114 NE2d 615 (CP).

## § 3767.11 Procedure when nuisance established in criminal proceeding. (GC § 6212-7)

In case the existence of a nuisance is established in a criminal proceeding, the prosecuting attorney shall proceed promptly, under sections 3767.01 to 3767.11, inclusive, of the Revised Code, to enforce such sections, and the finding of the defendant guilty in such criminal proceedings, unless reversed or set aside, shall be conclusive as against such defendant as to the existence of the nuisance. All moneys collected under such sections shall be paid to the county treasurer. The proceeds of the sale of the personal property, as provided in section 3767.06 of the Revised Code, shall be applied in payment of the costs of the action and abatement including the complainant's costs or so much of such proceeds as may be necessary, except as provided in sections 3767.07 to 3767.11, inclusive, of the Revised Code.

**HISTORY: GC § 6212-7; 107 v 514 (517), § 7. Eff 10-1-53.**

Penalty, RC § 3767.99(A).

**Research Aids**

O-Jur2d: Disorderly Houses § 6
Am-Jur: Prosecuting Atty. § 19

### [OTHER NUISANCES]

## § 3767.12 Keeping a resort for thieves; prohibition. (GC §§ 12454, 12453)

A house or building used or occupied as a habitual resort for thieves, burglars, or robbers is a public nuisance, and the court may order such nuisance abated.

No person shall keep a house which is a habitual resort of thieves, burglars, or robbers. No person shall let a house to be so kept, or knowingly permit a house which he has let to be so kept.

**HISTORY: GC §§ 12454, 12453; RS § 6558a; 85 v 6. Eff 10-1-53.**

**Cross-References to Related Sections**

Penalty, RC § 3767.99(B).
Plaintiff shall not recover costs, when, RC § 2323.42.
Remedies against nuisance, RC § 3767.01 et seq.

**Research Aids**

**Page:** Nuisance §§ 10, 23
O-Jur2d: Disorderly Houses §§ 3, 6
Am-Jur2d: Disorderly Houses § 1

**ALR**

Institution for the punishment or rehabilitation of criminals, delinquents, or alcoholics as enjoinable nuisance. 21 ALR3d 1038.

**Law Review**

Nuisance in a nutshell. Howard L. Oleck. 5 Clev MLRev 148.

## § 3767.13 Prohibitions. (GC § 12646)

No person shall erect, continue, use, or maintain a building, structure, or place for the exercise of a trade, employment, or business, or for the keeping or feeding of an animal which, by occasioning noxious exhalations or noisome or offensive smells, becomes injurious to the health, comfort, or property of individuals or of the public. No person shall cause or allow offal, filth, or noisome substances to be collected or remain in any place to the damage or prejudice of others or of the public. No person shall unlawfully obstruct

# Appendix C

*State of Ohio, ex rel Lawrence S. Huffman v. William H. Dakota et al.*, Case No. 72 CIV 0326 (being a Civil Action, in the Court of Common Pleas of Allen County Ohio, to abate the Cinerama I Theater as a public nuisance)

Papers included in Appendix:


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| Subpena Duces Tecum, filed Sept. 18, 1972 | 18 |

IN THE COURT OF COMMON PLEAS OF ALLEN COUNTY, OHIO

STATE OF OHIO, ex rel
LAWRENCE S. HUFFMAN
127-129 North Pierce Street
Lima, Ohio

PLAINTIFF

-vs-

WILLIAM H. DAKOTA
2650 West Market Street
Lima, Ohio

and

FLORA MAY COLLINS MOOR
104 South Dale Drive
Lima, Ohio

and

LELAND SAMUEL COLLINS
Address unknown

and

SARA LEE COLLINS
Address unknown

and

PUSSY CAT CORPORATION
#69 Public Square
Lima, Ohio

or

Los Angeles, California

and

CINEMA I. THEATRE
#69 Public Square
Lima, Ohio

and

JOHN DOE #1
c/o Cinema I
#69 Public Square
Lima, Ohio

CASE NO. 72 CIV 0326

COMPLAINT

JOHN DOE #2 :
c/o Cinema I
#69 Public Square

and :

JOHN DOE #3
c/o Cinema I
#69 Public Square :
Lima, Ohio

and
:
JOHN DOE #4
c/o Cinema I
#69 Public Square
Lima, Ohio :

and

JOHN DOE #5 :
c/o Cinema I
#69 Public Square
Lima, Ohio
:
and

JANE DOE #1
c/o Cinema I :
#69 Public Square
Lima, Ohio

and :

JANE DOE #2
c/o Cinema I
#69 Public Square :
Lima, Ohio

.. .. .. .. ..DEFENDANTS.. ..: .. .. .. .. .. .. .. ..

Now comes Lawrence S. Huffman, plaintiff, and for his cause in equity to abate the motion picture theatre known as "Cinema I" as a public nuisance in Allen County, Ohio, states:

1. That he is the prosecuting attorney of Allen County, Ohio, and brings this action in equity in the name of the State of Ohio pursuant to Sections 3767.01, et seq., of the Ohio Revised Code;

2. That defendant, William H. Dakota, is the manager and person

in control of the Cinema I Theatre, a motion picture theatre located at #69 Public Square, Lima, Allen County, Ohio;

5. That defendants, Flora May Collins Moor, Leland Samuel Collins and Sara Lee Collins are the owners of the premises and building in which the Cinema I Theatre is operated and the legal description of said property is as follows:

> Situate in the City of Lima, County of Allen and State of Ohio, and being all of Inlot Number One Hundred and Twenty-seven (127) in the Original Plat of the City of Lima, Ohio, excepting therefrom fifty-four (54) feet, six (6) inches, more or less, off of the entire East end of said lot.

4. That the defendant, Pussy Cat Corporation is a corporation which operates a motion picture theatre called Cinema I located at #69 Public Square, Lima, Ohio.

5. That defendants, John Doe #1, John Doe #2, John Doe #3, John Doe #4, John Doe #5, Jane Doe #1 and Jane Doe #2, whose names plaintiff cannot discover are employed at said Cinema I Theatre.

6. That the defendants, William H. Dakota, Flora May Collins Moor, Leland Samuel Collins, Sara Lee Collins, Pussy Cat Corporation, John Doe #1, John Doe #2, John Doe #3, John Doe #4, John Doe #5, Jane Doe #1 and Jane Doe #2 are now and have been deriving substantial revenues from the operation of the Cinema I Theatre and from the exhibition of obscene motion picture films in said theatre;

7. That for a period of ten weeks the Cinema I theatre has consistently shown obscene motion picture films in the City of Lima, County of Allen, State of Ohio, contrary to the laws of the State of Ohio; that such use of the premises described above establishes said premises as a nuisance, and, as such, the same should be abated;

(a) That the showing on the play dates July 12 -- July 18, 1972, of the motion picture "Man and Wife" was a violation of the obscenity and nuisance laws of the State of Ohio;

(b) That the showing on the play dates July 19 -- July 23, 1972, of the motion pictures "Hollywood Babylon" and "Down and Dirty" and the previews of coming attractions was a violation of the obscenity and nuisance laws of the State of Ohio.

(c) That the showing on the play dates July 25 -- August 1, 1972, of the motion pictures "The Hangup" and "The Cutthroats" and the previews of coming attractions was a violation of the obscenity and nuisance laws of the State of Ohio;

(d) That the showing on the play dates August 2 -- August 8, 1972, of the motion pictures "Wow, It's Cindy" and "Hot Spurs" and the previews of coming attractions was a violation of the obscenity and nuisance laws of the State of Ohio;

(e) That the showing on the play dates August 9 -- August 15, 1972, of the motion pictures "Prostitution, Pornography, U.S.A." and "Oddly Coupled" and the previews of coming attractions was a violation of the obscenity and nuisance laws of the State of Ohio;

(f) That the showing on the play dates August 16 -- August 22, 1972, of the motion pictures "Sandra, The Making of a Woman" and "Diamond Stud" and the previews of coming attractions was a violation of the obscenity and nuisance laws of the State of Ohio;

(g) That the showing on the play dates August 23 --

August 29, 1972, of the motion pictures, "Midnight Plowboy" and "Tobacco Roody" and the previews of coming attractions, was a violation of the obscenity and nuisance laws of the State of Ohio;

(h) That the showing on the play dates August 30 -- September 5, 1972, of the motion pictures, "The Blue Hour" and "The Grabbers" and the previews of coming attractions was a violation of the obscenity and nuisance laws of the State of Ohio;

(i) That the showing on the play dates September 6 -- September 12, 1972, of the motion pictures "Sweet Georgia" and "The Exotic Dreams of Casanova" and the previews of coming attractions was a violation of the obscenity and nuisance laws of the State of Ohio;

(j) That the showing on the play dates September 13 -- September 18, 1972, of the motion pictures, "Marriage Manual" and "Love Under 17" and the previews of coming attractions was a violation of the obscenity and nuisance laws of the State of Ohio.

That Appendices A --F and incorporated herein by reference as though fully set out are accurate time motion studies of the films named in paragraphs 7 (d) through 7 (i), which time and motion studies consist of a chronological series of photographs of each film, some of which have been timed in their relative order of appearance, which photographs fairly and accurately depict the conduct visually portrayed on the motion picture screen. Copies of said Appendices are not attached

to the copies of petitions to be served upon the defendants for the reason the costs of copies of said Appendices are prohibitive. Said Appendices can be examined in the original file of the Clerk of this Court.

8. (a) That on or about the 18th day of September, 1972, the defendant, Cinema I, caused a notice to be placed in the daily newspaper of Lima, Ohio, advertising the motion picture films "Marriage Manual" and "Love Under 17" at said Cinema I theatre; that the past and continuing exhibition of "Marriage Manual" and "Love Under 17" and the previews of coming attractions, and such other motion picture films as described herein at the Cinema I theatre did and does constitute a nuisance under Section 3767.01(C) of the Ohio Revised Code in that (1) the dominant theme of said motion picture films, taker as a whole, appeals to a prurient interest in sex; and (2) that said motion picture films are patently offensive because they affront contemporary community standards relating to the description or representation of sexual matters; and (3) said motion picture films are utterly without redeeming social value, which three elements coalesce.

9. That the exhibition of said motion picture films at Cinema I theatre is a violation of Chapter 3767 and other sections of the Ohio Revised Code in that such exhibitions cause moral pollution of the community and will cause and result in immediate and irreparable harm and damage to the morals and welfare of the people of the State of Ohio.

10. That the exhibition of said motion picture films at the Cinema I hereinabove alleged constitutes a public nuisance

as that term is defined in Section 3767.01 (C) of the Ohio Revised Code, which reads in part as follows:

> "Section 3767.01 Definitions
>
> As used in all sections of the Revised Code relating to nuisances:
> (C) 'Nuisance' means that which is defined and declared by statutes to be such and also means any place in or upon which lewdness . . . is conducted, permitted, continued, or exists, or any place, in or upon which . . . obscene films . . . are screened, exhibited, or otherwise prepared or shown, and the personal property and contents used in conducting and maintaining any such place for any such purpose."

for the following reasons:

(a) Visual depiction of the private parts of the body in public or the visual depiction of sex acts in public, whether real or simulated, is conduct which is contrary to good morals, public decency, and the long-standing public policy of the people of the State of Ohio as expressed by the State Legislature in enacting Sections 2905.01, 2905.03, 2905.08, 2905.19, 2905.30, 2905.31, 2905.35, 2905.44, and other Sections in the Ohio Revised Code.

(b) The conduct described in subparagraph (a) above, if performed offstage and in public in three-dimensional form, would constitute violations of the laws of the State of Ohio regulating public displays of such sexual activity, and that reproduction on the motion picture screen in public in two-dimensional form, in the matter indicated, is contrary to good morals and public decency and constitutes obscenity as a matter of law.

(c) Such conduct is demonstrated by the following visual depictions in the time and motion studies hereinbefore referred to as Appendices A -- F.

APPENDIX A. "Wow, It's Cindy" and "Hot Spurs". Lesbianism depicted on pages 1, 4 and 5; cunnilingus depicted on pages 1 and 6; sexual intercourse depicted on pages 1, 2, 6 and 8; auto eroticism depicted on page 3; group sex depicted on pages 4, 5 and 7; fellatio depicted on pages 6 and 8.

APPENDIX B. "Prostitution, Pornography U.S.A." and "Oddly Coupled". Masturbation depicted on page 2; sexual intercourse depicted on pages 2, 3, 5, 7 and 16; fellatio depicted on pages 3, 6 and 10; anal sodomy depicted on page 5; sexual sadism depicted on pages 5 and 6; lesbianism depicted on pages 11 and 12; cunnilingus depicted on page 15; group sex depicted on pages 20 and 21.

APPENDIX C. "Sandra, The Making of a Woman" and "Diamond Stud". Sexual intercourse depicted on pages 3, 6, 15 and 22; auto eroticism depicted on pages 5 and 6; cunnilingus depicted on pages 7, 8, 14 and 21; lesbianism depicted on page 9; rape depicted on pages 10, 11 and 14.

APPENDIX D. "Midnight Plowboy" and "Tobacco Roody". Lesbianism depicted on page 8; sexual intercourse depicted on pages 8, 9, 10, 17, 18, and 20; cunnilingus depicted on page 14; fellatio depicted on page 28.

APPENDIX E. "The Blue Hour" and "The Grabbers". Lesbianism depicted on pages 7 and 8; sexual intercourse depicted on pages 7 and 13; auto eroticism depicted on page 12; group rape depicted on pages 12 and 13.

APPENDIX F. "The Exotic Dreams of Casanova" and "Sweet Georgia". Sexual intercourse depicted on pages 1, 2, 8, 9, 15, 16, 21, 22, 23 and 24; masochism depicted on page 4; auto eroticism depicted on pages 14 and 24; lesbianism depicted on pages 19 and 20.

11. That each and all of the foregoing acts and the conduct of the defendants in the use of said property for the use and purposes and in the manner aforesaid, interferes in the tranquility, peace and quiet, generally, of plaintiff and the nearby communities, constitutes unlawful, unwarranted, and unreasonable use of defendants' property to the extreme annoyance, disturbance, discomfort, and hurt of plaintiff, and is detrimental to the public good and to the common welfare; such lewd acts and conduct are offensive to public decency, morals, peace, and health, and constitute a public nuisance which is subject to abatement under Chapter 3767 of the Ohio Revised Code, and should be forthwith enjoined and abated; and that unless enjoined by the Court, the defendants, and each of them, by themselves, and through their agents or representatives, will exhibit the motion picture films "Marriage Manual" and "Love Under 17" and other similar films at the Cinema I theatre and at other theatres near and in the close proximity to the community in which plaintiff resides, and elsewhere in the State of Ohio.

WHEREFORE, plaintiff prays:

1. That such nuisance be forthwith abated by order of the Court pursuant to the provisions set forth in Chapter 3767 of the Ohio Revised Code.

2. That pending a final determination of this action, the Court fix a time and place for the hearing of plaintiff's Motion for a Preliminary Injunction, (a) enjoining and restraining the defendants, pendente lite from maintaining such nuisance, and (b) requiring an accounting of the box office receipts

arising out of the exhibition of the above named motion picture films; that at the time and place so fixed, the defendants be required to appear with the above named motion picture films and each of them, and show cause, if any they have, at said hearing, why an injunction should not be issued, and why an accounting should not be ordered of all box office receipts arising out of the exhibition of said motion picture films from the first exhibition thereof in the State of Ohio to and including the final performance after termination of the appeal in favor of the State of Ohio, and the same forfeited to the State of Ohio as contraband upon final determination of the appeal in favor of the State of Ohio.

3. That the defendants, and all of them, and all persons acting by, through, under or in concert with them be permanently enjoined and restrained from exhibiting said motion picture films in the State of Ohio;

4. That plaintiff have judgment for costs herein and for such other and further relief as the Court may deem proper.

STATE OF OHIO

By_____
Lawrence S. Huffman
Prosecuting Attorney
Allen County, Ohio

STATE OF OHIO
SS:
ALLEN COUNTY

LAWRENCE S. HUFFMAN, being first duly sworn, deposes and says that he has read the foregoing Petition and that the

facts and allegations contained in the foregoing Petition are true as he verily believes.

_____

Sworn to before me and subscribed in my presence, this _____ day of _____, 1972.

_____
Notary Public

IN THE COURT OF COMMON PLEAS OF ALLEN COUNTY, OHIO

| | | |
|---|---|---|
| STATE OF OHIO, ex rel LAWRENCE S. HUFFMAN | : | |
| Plaintiff | : | CASE NO. _____ |
| -vs- | : | |
| WILLIAM H. DAKOTA, et al | : | MOTION FOR |
| Defendant | : | TEMPORARY INJUNCTION |
| | : | |

Now comes the plaintiff and respectfully represents to the Court that the defendants are exhibiting and showing to the public at the Cinema I theatre, #69 Public Square, Lima , Ohio two motion picture films entitled "Marriage Manual" and "Love Under 17" and the previews of coming attractions, and defendants have exhibited and shown the following films on the following dates:

(a) From July 12 -- July 18, 1972, the motion picture "Man and Wife";

(b) From July 19 -- July 23, 1972 the motion pictures "Hollywood Babylon" and "Down and Dirty" and the previews of coming attractions;

(c) From July 25 -- August 1, 1972, the motion pictures "The Hangup" and "The Cutthroats" and the previews of coming attractions;

(d) From August 2 -- August 8, 1972, the motion pictures "Wow, It's Cindy" and "Hot Spurs" and the previews of coming attractions;

(e) From August 9 -- August 15, 1972, the motion pictures "Prostitution, Pornography U.S.A" and "Oddly Coupled" and the previews of coming attractions;

(f) From August 16 -- August 22, 1972, the motion pictures "Sandra, The Making of a Woman" and "Diamond Stud" and the previews of coming attractions;

(g) From August 23 -- August 29, 1972, the motion pictures "Midnight Plowboy" and"Tobacco Roody" and the previews of coming attractions.

(h) From August 30 -- September 5, 1972, the motion pictures "The Blue Hour" and "The Grabbers" and the previews of coming attractions;

(i) From September 6 -- September 12, 1972, the motion pictures "Sweet Georgia" and "The Exotic Dreams of Casanova" and the previews of coming attractions;

(j) From September 13 -- September 18, 1972, the motion pictures, "Marriage Manual" and 'Low Under 17' and the previews of coming attractions;

and that the defendants will, unless restrained, continue to exhibit and show to the public in the State of Ohio, the said motion picture films which have caused and will cause and result and have resulted in an immediate and irreparable harm and damage to the morals and welfare of the people of the State of Ohio, and that plaintiff has no adequate remedy at law.

Plaintiff therefore moves the Court for a preliminary injunction (a) enjoining and restraining the defendants, pendente lite, from maintaining such nuisance and (b) requiring an accounting of the box office receipts arising out of the exhibition and showing of the above named motion picture films; that the defendants be required to appear with the above named motion

picture films and each of them, and show cause, if any they have, at said hearing, why an injunction should not be issued, and why an accounting should not be ordered of all box receipts arising out of the exhibition and showing of said motion picture films from the first exhibition thereof in the State to and including the final performance after termination of the appeal in favor of the State of Ohio; and the same be forfeited to the State of Ohio as contraband upon a final determination of the appeal in favor of the State of Ohio.

STATE OF OHIO, ex rel
LAWRENCE S. HUFFMAN

By_____

C-17

IN THE COURT OF COMMON PLEAS OF ALLEN COUNTY, OHIO

STATE OF OHIO, ex rel
LAWRENCE S. HUFFMAN

Plaintiff

-vs-

WILLIAM H. DAKOTA, et al

Defendant

CASE NO. _____

NOTICE FOR HEARING

.. .. .. .. .. .. .. .. .. .. .. .. .. .. .. .. .. .. ..

The defendants herein will take notice that a Motion for Temporary (Preliminary) Injunction will be for hearing before one of the Honorable Judges of the Court of Common Pleas of Allen County, Ohio, on the 26TH day of September, 1972, at 9:30 o'clock A.M., at the Courthouse in Lima, Ohio, or as soon thereafter as the Court can hear the same.

.....

Assignment Commissioner

C-18

Baldwin's Ohio Printing Co., Columbus, Ohio

# Subpena Duces Tecum

CIVIL CASE

Revised Code, Sec. 2317.11, 2317.13, 2317.17

The State of Ohio, Allen County. Common Pleas Court

To William H. Dakota

John Doe #1 (Projectionist or Person or Persons in Possession of said films
John Doe #2

*You are hereby required to be and appear before the Common Pleas Court at the Court House in said County, on the* 26th *day of* September *A. D.* 1972, *at* 9:30 *o'clock* A *M., to testify as a witness in a certain case pending in said Court, wherein* State of Ohio, ex rel Lawrence S. Huffman *Plaintiff*, *and* William H. Dakota, et al *Defendants*;

*and also that you bring with you and produce at the time and place aforesaid* the following motion picture films:

1. "Man and Wife" for the play dates July 12 -- July 18, 1972;
2. "Hollywood Babylon" and "Down and Dirty" and the previews of coming attractions for the play dates July 19 -- July 25, 1972.
3. "The Hangup" and "The Cutthroats" and the previews of coming attractions for the play dates July 25 -- August 1, 1972.
4. "Wow, It's Cindy" and "Hot Spurs" and the previews of coming attractions for the play dates August 2 -- August 8, 1972.
5. "Prostitution, Pornography U.S.S." and "Oddly Coupled" and the previews of coming attractions for the play dates August 9 -- August 15, 1972.
6. "Sandra, The Making of a Woman" and "Diamond Stud" and the previews of coming attractions for the play dates August 16 -- August 22, 1972.
7. "Midnight Plowboy" and "Tobacco Roady" and the previews of coming attractions for the play dates August 23 -- August 29, 1972.
8. "The Blue Hour" and "The Grabbers" and the previews of coming attractions for the play dates August 30 -- September 5, 1972.
9. "Sweet Georgia" and "The Exotic Dreams of Casanova" and the previews of coming attractions for the play dates September 6 -- September 12, 1972.
10. "Marriage Manual" and "Love Under 17" and the previews of coming attractions for the play dates September 13 -- September 18, 1972.
11. "The Pig Keeper's Daughter" and "Please Don't Eat My Mother" and the previews of coming attractions for the play dates September 19 -- 25, 1972.

*and not depart the Court without leave. Herein fail not, under penalty of the law. And have you then and there this writ.*

*Said Court requires your said attendance on behalf of the* Pltf.

*WITNESS my hand and the seal of said Court, this* 18th *day of* September *19*72

Robert D. Hinkle, Clerk

By Gerald E. Wehrman, Deputy

# Appendix D

*State of Ohio, ex rel Lawrence S. Huffman v. William H. Dakota et. al.*, Case No. 72 CIV 0326 (being a Civil Action, in the Court of Common Pleas of Allen County, Ohio to abate the Cinema I Theater as a public nuisance)

Papers included in Appendix: Page

Amended Complaint ..... 3-8

IN THE COURT OF COMMON PLEAS OF ALLEN COUNTY, OHIO

STATE OF OHIO, ex rel
LAWRENCE S. HUFFMAN

PLAINTIFF

-vs-

CASE NO. 72 CIV 0326

WILLIAM H. DAKOTA aka
JACK DESMOND aka
WILLIAM KERN
2650 West Market Street
Lima, Ohio

AMENDED COMPLAINT

and

FLORA MARY COLLINS MOOR
104 South Dale Drive
Lima, Ohio

and

LELAND SAMUEL COLLINS
510 River Street, R.D. #2
Madison, Ohio 44057

and

SARA LEE COLLINS (WALLACE)
1338 Monticello Boulevard, North
Saint Petersburg, Florida 33073

and

PUSSY CAT CORPORATION
#69 Public Square
Lima, Ohio

or

Los Angeles, California

and

CINEMA I THEATRE
#69 Public Square
Lima, Ohio

and

JOHN BROWNELL
1655 Reed Road
Lima, Ohio

and :

ROBERT SMITH aka SISSON :
406 East North Street
Lima, Ohio :

and :

ALLEN R. BROWN :
2865 South Dixie Highway
Lima, Ohio :

and :

JOHN DOE #4 :
c/o Cinema I
#69 Public Square :
Lima, Ohio
:

and
:

JOHN DOE #5
c/o Cinema I :
#69 Public Square
Lima, Ohio ::

and :

GERALDINE SCOTT :
150 East 10th Street
Lima, Ohio :

and :

JANE DOE #2 :
c/o Cinema I
#69 Public Square :
Lima, Ohio
:

and
:

All other persons unknown
claiming any ownership, right, :
title, or interest in the
property affected by the action. :

DEFENDANTS :

.. .. .. .. .. .. .. .. .. .. .. .. .. .. .. .. .. —

Now comes Lawrence S. Huffman, plaintiff, and pursuant to Rule 15, Ohio Rules of Civil Procedure, amends his original complaint filed herein on September 18, 1972, as follows:

1. That the caption of the case is amended to the following form:

State of Ohio, ex rel Lawrence S. Huffman
127-129 North Pierce Street
Lima, Ohio

Plaintiff

-vs-

William H. Dakota aka
Jack Desmond
aka William Kern
2650 West Market Street
Lima, Ohio

and

Flora Mary Collins Moor
104 South Dale Drive
Lima, Ohio

and

Leland Samuel Collins
510 River Street, R. D. #2
Madison, Ohio 44057

and

Sara Lee Collins (Wallace)
1338 Monticello Boulevard, North
Saint Petersburg, Florida 33073

and

Pussy Cat Corporation
#69 Public Square
Lima, Ohio

or

Los Angeles, California

and

Cinema I Theatre
#69 Public Square
Lima, Ohio

and

John Brownell
1655 Reed Road
Lima, Ohio

and

Robert Smith aka Sisson
406 East North Street
Lima, Ohio

and

Allen R. Brown
2865 South Dixie Highway
Lima, Ohio

and

John Doe #4
c/o Cinema I
#69 Public Square
Lima, Ohio

and

John Doe #5
c/o Cinema I
#69 Public Square
Lima, Ohio

and

Geraldine Scott
150 East 10th Street
Lima, Ohio

and

Jane Doe #2
c/o Cinema I
#69 Public Square
Lima, Ohio

and

All other persons unknown
claiming any ownership, right,
title, or interest in the
property affected by the action.

2. That paragraph 3 is amended to read as follows:

"That defendants, Flora Mary Collins Moor, Leland Samuel Collins, and Sara Lee Collins (Wallace) are the owners of the premises and building in which the Cinemal Theatre is operated and the legal description of said property is as follows:

> Situate in the City of Lima, County of Allen and State of Ohio, and being all of Inlot Number One Hundred and Twenty-seven (127) in the Original Plat of the City of Lima, Ohio, excepting therefrom fifty-four (54) feet six (6) inches, more or less, off of the entire east end of said lot,

and that persons umknown have or claim ownership, right, title or interest in the property above described."

3. That paragraph 5 is amended to read as follows:

"That defendants, John Brownell, Robert Smith, Allen R. Brown, and Geraldine Scott are employed at said Cinema I Theatre; and that John Doe #4, John Doe #5 and Jane Doe #2, whose names plaintiff cannot discover are employed at said Cinema I Theatre."

4. That paragraph 6 is amended to read as follows: "That the defendants, William H. Dakota, Flora Mary Collins Moor, Leland Samuel Collins, Sara Lee Collins (Wallace), Pussy Cat Corporation, John Brownell, Robert Smith aka Sisson, Allen R. Brown, John Doe #4, John Doe #5, Geraldine Scott, Jane Doe #2, and all other persons unknown claiming any ownership, right, title or interest in the property affected by the action are now and have been deriving substantial revenues from the operation of the Cinema I Theatre and from the exhibition of obscene motion picture films in said theatre."

5. That paragraph 7 after subparagraph (J) is amended to read as follows: "That Appendices A -- G and incorporated herein by reference as though fully set out are accurate time motion studies of the films named in paragraphs 7(d) through 7(j), which time and motion studies consist of a chronological series of photographs of each film, some of which have been timed in their relative order of appearance, which photographs fairly and accurately depict the conduct visually portrayed on the motion picture screen. Copies of said Appendices are not attached to the copies of the petitions to be served upon the defendants for the reason the costs of said Appendices are prohibitive. Said Appendices can be examined in the original file of the Clerk of this Court;" and that attached hereto and incorporated herein by reference is said Appendix G.

6. That subparagraph (c) of paragraph 10 is amended to read as follows: "Such conduct is demonstrated by the following visual depictions in the time and motion studies hereinbefore referred to as Appendices A -- G'" and that subparagraph (c) of paragraph 10 after Appendix F is amended to read as follows: "APPENDIX G. 'Marriage Manual' and 'Love Under 17'. Lesbianism depicted on pages 2 and 3; sexual intercourse

depicted on pages 7, 8, 9, 10, 11, 12, and 13; rape depicted on pages 14 and 15."

Plaintiff Lawrence S. Huffman re-alleges as if fully rewritten herein each and every other allegation, including all appendices contained in his original complaint.

STATE OF OHIO

By_____
Lawrence S. Huffman
Prosecuting Attorney
Allen County, Ohio

STATE OF OHIO
SS:
ALLEN COUNTY

LAWRENCE S. HUFFMAN, being first duly sworn, deposes and says that he has read his original complaint and the foregoing amendments to his original complaint and that the facts and allegations in the foregoing amendments and his original complaint, except as amended, are true as he verily believes.

_____

Sworn to before me and subscribed in my presence, this ____ day of September, 1972.

_____
Notary Public

# Appendix E

*State of Ohio, ex rel Lawrence S. Huffman v. William H. Dakota et al.*, Case No. 72 CIV 0326 (being a Civil Action, in the Court of Common Pleas of Allen County Ohio, to abate the Cinema I Theater as a public nuisance)

Papers Included in Appendix: Page

Order of Common Pleas Judge Robert M. Light, dated Oct. 24, 1972 ..... 3-4

E-3

IN THE COURT OF COMMON PLEAS OF ALLEN COUNTY, OHIO

THE STATE OF OHIO ex rel LAWRENCE S. HUFFMAN :

Plaintiff : CASE NO. 72 CIV 0326

-vs- : O R D E R

WILLIAM H. DAKOTA, et al :

Defendant :

.. .. .. .. .. .. .. .. .. .. .. .. .. .. .. .. ..

This matter came on to be heard upon the verified complaint alleging facts constituting a nuisance, upon motion for a temporary injunction, on all and documentary evidence, upon oral and written argument of counsel, and the Court being fully advised in the premises finds that a nuisance exists as alleged at the Cinema I Theatre at #69 Public Square, Lima, Ohio, and the same should be forthwith abated.

The evidence shows that the realty upon which the Cinema I Theatre is located is owned by the defendants, Leland Samuel Collins, Flora Mary Collins Moor and Sara Lee Collins Wallace. The evidence further shows that William H. Dakota is the person in charge of said theatre and is maintaining said nuisance, and that defendants Robert Smith, Allen R. Brown, John Brownell and Geraldine Scott are employed at said theatre.

The Court orders the Cinema I Theatre at #69 Public Square, Lima, Ohio, closed forthwith for any purpose of lewdness, to wit: the projection or screening of lewd, indecent, lascivious, or obscene films.

The defendants and all persons acting in any way in concert with them are hereby restrained from removing or in any

manner interfering with the personal property and contents of the premises at Cinema I Theatre, #69 Public Square, Lima, Ohio, until further Order of the Court.

The officer serving this Order shall forthwith make and return into Court an inventory of the personal property and contents situated in the building at #69 Public Square, Lima, Ohio, and used in conducting or maintaining the motion picture projection and screening therein.

Any violation of this Order shall be a contempt of Court; any mutilation or removal of this Order while the same remains in force shall likewise be a contempt of Court. The Court Orders that defendants show cause, if any they can, why this closing Order should not be made permanent as of this date.

Robert M. Light, Judge

THE STATE OF OHIO, } ss
Allen County.

I, ... Clerk of the ... Court of Common Pleas in and for said County, do hereby certify that the foregoing is a true and correct copy of the original Order as the same appears on file in said Clerk's office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of said Court, at Lima, Ohio, this 21st day of Oct. A. D. 1972

SEAL

ROBERT H. ...
Clerk of ...
By V. Belogianiouch

## Appendix F

*William Dakota v. Sheriff Edward Fair of Allen County and Deputy Sheriff Joe Garlock*, C72-384. (being a Civil Rights Action in the United States District Court for the Northern District of Ohio, Western Division)


| Papers Included in Appendix: | Page |
|---|---|
| Complaint filed October 26, 1972 (less Exhibits 1, 2 and 3) | 3-9 |
| Motion for Temporary Restraining Order, filed October 26, 1972 | 10 |
| Motion for Preliminary Injunction, filed October 26, 1972 | 11 |
| Memorandum in Support of Motions for a Temporary Restraining Order and Preliminary Injunction, filed October 26, 1972 | 12-21 |
| Motion to Convene A Three Judge Panel, filed October 26, 1972 | 22 |
| Memorandum of Law on Effect of Removal on State Court Action, filed in Allen County Common Pleas Court on October 26, 1972 | 23-24 |

F-3

IN THE UNITED STATES DISTRICT COURT
IN THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

William Dakota
2650 Market Street
Lima, Ohio

Plaintiff

-vs-

Sheriff Edward Fair
Sheriff of Allen County
Allen County Jail
Lima, Ohio 45801

and

Deputy Sheriff Joe Garlock
Deputy Sheriff of Allen County
Special Investigator Assigned
to the Allen County Prosecutor,
Lawrence Huffman
Allen County Court House
Lima, Ohio 45801

Defendants

C 72-384
Civil Action No.

COMPLAINT

Plaintiff for his claim against Defendants states:

1. Plaintiff, William Dakota, is the manager and lessee of the Cinema I Theatre, #69 Public Square, in Lima, Ohio which shows motion picture films to the public.

2. Defendants, Edward Fair and Joe Garlock, are citizens and residents of Allen County, Ohio, occupying the official position set forth in the caption.

3. The amount in controversy, exclusive of interest and costs, exceeds Ten Thousand Dollars ($10,000.00).

4. This action arises under the First and Fourteenth Amendments to the Constitution, and this court has jurisdiction under 28 U.S.C. 1331. Jurisdiction is further based on 28 U.S.C. 1343, as this is an action to secure equitable relief for the protection of Plaintiff's civil rights pursuant to 42 U.S.C. 1983. Plaintiff also seeks a declaratory judgement under 28 U.S.C. 2201 and 2202.

5. This action seeks a temporary restraining order, preliminary injunction and permanent injunction to restrain the Defendants and their agents, representatives, employees, assigns

and successors, from obstructing, hindering or otherwise interfering with Plaintiff's right to keep open the Cinema I Theatre, #69 Public Square, Lima, Ohio for the presentation to the public of motion picture films.

6. Plaintiff also seeks a declaratory judgement under 28 U.S.C. 2201 and 2202, declaring Ohio Revised Code 3767.01 to 3767.11 inclusive, to be in violation of the First and Fourteenth Amendments to the United States Constitution.

On September 18, 1972 Plaintiff, William Dakota, was made a Defendant in a case styled State of Ohio, ex rel, Lawrence S. Huffman v William H. Dakota; 72 Civ 0326 which was filed in the Allen County Court of Common Pleas. The Complaint prayed for the Allen County Court of Common Pleas to (1) declare the Cinema I Theatre a nuisance; (2) that a preliminary injunction issue enjoining and restraining William Dakota from continuing to operate the Cirema I Theatre; (3) that there be an accounting of box office receipts and forfeiture of the same; (4) that William Dakota be restrained from exhibiting certain motion picture films named in the Complaint (See, Exhibit 1).

8. William Dakota was issued a subpoena duces tecum in State of Ohio, ex rel, Lawrence S. Huffman v William Dakota; 72 Civ 0326 requiring him to bring into court certain named films and business records (See, Exhibit 2). Plaintiff timely filed a Motion to Quash the subpoena duces tecum as a violation of his Fifth Amendment right and it was overruled by the court. Plaintiff timely filed a motion to declare the Ohio nuisance statutes unconstitutional in the state courts, but this motion was overruled.

9. A hearing was held in the Allen County Court of Common Pleas before Judge Robert Light on October 24, 1972. He ordered the theatre closed (See, Exhibit 3).

10. A Motion to Stay the Order set forth in paragraph 9 was filed and denied by the Allen County Court of Common Pleas.

11. A hearing on the permanent injunction is scheduled for November 30, 1972 and December 1, 1972 (See, Exhibit 4). The Allen County Court of Common Pleas has made it known that November 7, 1972 will be an alternative hearing date on the permanent injunction if the court's schedule provides.

12. William Dakota had agreed to stipulate to the permanent order in the state court reserving all objections made in the hearing on the preliminary injunction. The State of Ohio, through Lawrence Huffman, has rejected this offer

13. The order granting a preliminary injunction set forth in paragraph 9 is not a final appealable order under Ohio law. Only a permanent injunction can be appealed under Ohio law. Plaintiff's Cinema I Theatre must remain closed until the hearing on the permanent injunction and is left without an adequate remedy at law.

14. On October 24, 1972 at approximately 3:00 a.m the Defendant, Joe Garlock, padlocked the Cinema I Theatre. Plaintiff cannot show any motion picture films to the public at the Cinema I Theatre due to the state court's order and the action of the Defendants in enforcing the same.

15. The films viewed by Judge Light in the state court proceedings are constitutionally protected and are not obscene.

16. The closing down and padlocking of the Cinema I Theatre pursuant to 3767.01 through 3767.11 of the Ohio Revised Code is unconstitutional since the aforecited sections are patently unconstitutional under the provisions of the First and Fourteenth Amendments to the United States Constitution and the most recent decisions of the Supreme Court of the United States since they have provided a basis to compose a prior restraint on free speech without a prior adversary hearing, deny procedural due process, are overly vague and broad do not provide for a prompt, final judicial determination of the obscenity of the films in question, and fail to follow the standards of obscenity prescribed by decisions of the Supreme Court.

17. The acts of Defendants herein alleged are acts under color of state law subjecting Plaintiff, a citizen of the United States, to a deprivation of rights, privileges and immunities secured to them by the Constitution and laws of the United States, and causing Plaintiff to be deprived of his rights hereinabove alleged under the First and Fourteenth Amendments to the Constitution, in violation of 42 U.S.C. 1983.

18. Plaintiff has suffered and will continue to suffer irreparable harm and injury by reason of the acts of the Defendants in closing the theatre and is without an adequate remedy at law and is being denied by a total prior restraint from exercising his rights under the Constitution.

WHEREFORE, Plaintiff prays for the following relief:

(a) That a declaratory judgement issue declaring 3767.01 to 3767.11 inclusive, of the Ohio Revised Code to be void as violative of the Constitution of the United States, both on their face and as invoked against the Plaintiff by the closing down and padlocking of the Cinema I Theatre.

(b) That a temporary restraining order, preliminary and permanent injunctions issue restraining and enjoining the Defendants, their agents, servants, representatives and successors in office:

(1) From padlocking or attempting to close down the Cinema I Theatre and/or continuing the padlocking and enforced closure of the Cinema I Theatre.

(2) From padlocking or attempting to close down the Cinema I Theatre until the hearing on the permanent injunction is held in state court and/or continuing the padlocking and enforced closure of the Cinema I Theatre until the hearing on the permanent injunction is held in state court.

(3) From preventing Plaintiff from exercising his rights, privileges and immunities guaranteed to him by the Constitution and laws of the United States.

(c) For any and all other relief which the court may see fit to grant.

Respectfully submitted,

LAW OFFICES OF JACK GALLON

By_____
Ted Iorio

STATE OF OHIO )
)SS:
COUNTY OF LUCAS)

William Dakota, being first duly sworn according to law, deposes and says that he is the manager and lessee of the Cinema I Theatre, #69 Public Square, Lima, Ohio and is the Plaintiff herein; that he has read the foregoing Complaint and knows the contents thereof and that the facts and allegations therein are true.

_____
William Dakota

Sworn to and subscribed before me in my presence this 16th day of October, 1972.

_____
Notary Public

JUDY M. NAULT
Notary Public, Lucas County, Ohio
My Commission expires Dec. 9, 1976

THE COURT OF COMMON PLEAS
ALLEN COUNTY
LIMA, OHIO 45801

JOHN H. DAVISON
JOHN D. HARNISHFEGER
JUDGES

October 20, 1972

Ted Iorio
Law Offices of Jack Gallon
Teamster Building
435 S. Hawley Street
Toledo, Ohio 43609

IN RE: Huffman v Dakota - Case No. 72 Civ 0326

Dear Mr. Iorio:

Enclosed herewith is copy of order which will be filed with the Clerk of this Court on Tuesday, October 24, 1972, which in effect closes Cinema I. Also enclosed is notice of hearing on permanent injunction matters for November 30, 1972 and December 1, 1972, inasmuch as prosecution does not wish to waive the right to introduce further evidence herein. If you have any questions, it is presumed you will telephone the undersigned.

Thank you for all your courtesies.

Very truly yours,

Robert M. Light,
Presiding Judge

RML/mk

Enc. 2

EXHIBIT 4

CERTIFICATION C 72-334

I hereby certify that I called Lawrence Huffman, Prosecuting Attorney of Allen County, Ohio, who is the legal representative of the Sheriff and Deputy Sheriff, Defendants named herein, at on the day of October, 1972 to notify him that I would be attempting to obtain a temporary restraining order at 9:00 a.m. on October 26, 1972.

IN THE UNITED STATES DISTRICT COURT
IN THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

| | | |
|---|---|---|
| William Dakota | ) | |
| Plaintiff | ) | Civil Action No. C 72-384 |
| -vs- | ) | |
| Sheriff Edward Fair, et al | ) | MOTION FOR TEMPORARY RESTRAINING ORDER |
| Defendants | ) | |
| | ) | |

Now comes the Plaintiff, by and through his attorney, and requests the court to issue a temporary restraining order enjoining the Defendants from continuing the padlocking of the Cinema I Theatre, #69 Public Square, Lima, Ohio and enforcing the closure of the theatre. Plaintiff requests the temporary restraining order since Plaintiff's Cinema I Theatre is forcibly closed down and Plaintiff cannot invoke his First and Fourteenth Amendment right to free speech and will continue to suffer irreparable harm and be without an adequate remedy at law.

Respectfully submitted,

LAW OFFICES OF JACK GALLON

By_____
Ted Iorio

F-11

IN THE UNITED STATES DISTRICT COURT
IN THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

| | | |
|---|---|---|
| William Dakota | ) | |
| Plaintiff | ) | C 72-384 |
| -vs- | ) | Civil Action No. |
| Sheriff Edward Fair, et al | ) | MOTION FOR PRELIMINARY INJUNCTION |
| Defendants | ) | |
| | ) | |

Now comes the Plaintiff, by and through his attorney, and requests the court to set a hearing date to determine whether a preliminary injunction will issue granting injunctive and declaratory relief requested by the Plaintiff in the Complaint filed herein and preventing Defendants from continuing to padlock and enforce the closure of the Cinema I Theatre and from threatening or obstructing, hindering or otherwise interfering with Plaintiff's right of freedom of expression. Without a hearing on the Motion, Plaintiff will continue to suffer irreparable harm and be without the benefit of an adequate remedy at law.

LAW OFFICES OF JACK GALLON

By_____
Ted Iorio

NOTICE OF HEARING

Defendants will please take notice that the foregoing Motion will be heard before the Honorable United States District Court Judge, U.S. Court House, Toledo, Ohio, on the day of at in the United States District Court for the Northern District of Ohio, Western Division, 213 U.S. Court House and Customs Building, 1716 Spielbusch Avenue, Toledo, Ohio 43624.

IT IS ORDERED: _____

IN THE UNITED STATES DISTRICT COURT
IN THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

| | | |
|---|---|---|
| William Dakota | ) | |
| Plaintiff | ) | Civil Action NO. C 72 - 384 |
| -vs- | ) | |
| Sheriff Edward Fair, et al | ) | MEMORANDUM IN SUPPORT OF MOTIONS FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION |
| Defendants | ) | |
| | ) | |

FACTS

The facts at bar can be simply stated. Plaintiff at bar was the party Defendant in Huffman v Dakota; 72 Civ 0326 wherein the Plaintiff, Huffman, asked, among other requests for relief, a complete closing of the Cinema I Theatre which Plaintiff at bar manages and is the lawful lessee. After a hearing in state court, where Plaintiff at bar timely raised the question of the constitutionality of the nuisance statute (3767.01 to 3767.11, Ohio Revised Code), the state court ordered the closing of the theatre.

It is Plaintiff's contention that the Ohio nuisance statute is constitutionally deficient since it permits a total prior restraint preventing the Plaintiff at bar from showing any motion picture films in the future. Plaintiff's contention and others are supported by the rationale to follow.

UTILIZATION OF 3767.01, OHIO REVISED CODE
TO ENJOIN THE DISTRIBUTION OF NON-OBSCENE
MATERIAL [illegible]
RIGHTS [illegible] AMENDED
TO THE [illegible]
(2) THE [illegible]
STANDARD [illegible]
PICTURE [illegible]
STATE [illegible]
JUDICIAL [illegible]
FY THE CONSTITUTIONAL [illegible].

The primary issue before this court is whether the Ohio state statutory nuisance scheme as applied to free speech material is unconstitutional as a prior restraint of the exercise of the right of free speech and press as guaranteed by the First and Fourteenth Amendments to the United States Constitution. 3767.04, Ohio Revised Code provides:

> "If at the time of granting a temporary injunction, it further appears that the person owning, in control, or in charge of the nuisance so enjoined had received five days' notice of the hearing and unless such person shows to the satisfaction of the Court or judges that the nuisance complained of is abated, or that such person proceeded forthwith to enforce his rights under Section 3767.10 of the Ohio Revised Code, the court adjudged shall forthwith issue an order closing. . . . . .

> the place against its use for any purpose of lewdness, assignation, or prostitution until final decision is rendered on the application for permanent injunction. Such order shall also continue in effect for such further period the restraining order above provided if already issued, or, if not so issued, shall include such an order restraining for such period the removal or interference with the personal property and contents located therein."

The above-quoted section of the Ohio Code clearly indicates that the Court may close the theatre in question from future showings of any free speech material.

In Near v State of Minnesota, 283 U.S. 697, the United States Supreme Court held invalid a statute which is parallel to the statute at bar whereby the State of Minnesota attempted to enjoin a newspaper as a nuisance from continuing publication.

The lower Court in Near, ruled that the "Saturday Press" was a public nuisance and that it be abated and perpetually enjoined

> "from producing, editing, publishing, circulating, having in their possession, selling, or giving away any publication whatsoever which is malicious, scandalous, or defamatory newspaper as defined by law, and also from further conducting said nuisance under the name and the title of said "Saturday Press" or any other name or title."

The Defendant in Near, appealed to the United States Supreme Court which stated as follows:

> "This statute for the suppression as a public nuisance of a newspaper or periodical is unusual if not unique and raises questions of great importance transcending the local interests involved in the particular action. It is no longer open to doubt that the liberty

> of the press and of speech is within the liberty, safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action."

The Court went on to point out that whatever harm may have been caused by the newspaper could have been remedied by the libel laws in Minnesota. The Court continued addressing itself to the prior restraint which the state order permitted. The Court commented:

> "The fact that the public officers named in this case, and those associated with the charges of official dereliction, may be deemed to be impeccable, cannot affect the conclusion that the statute imposes an unconstitutional restraint upon publication."

Simply stated, the Court in Near, rejected in toto any prior restraint judicial or legislative which would deny an individual his right to publish or screen any free speech material.

Since Near, which is a landmarked case in this area, numerous courts have followed its dictates. In Oregon Bookmark Corp. v Schrunk, 321 F. Supp. 639, the District Court ruled unconstitutional a city ordinance. That ordinance permitted the City Council to refuse to issue a license for the sale of books in a book store if the City Council deemed that store a nuisance.

The Court in Oregon Bookmark, addressed itself to the question whether a city has the constitutional power to employ a nuisance law for the purpose of censoring undesirable publications. The Court addressed that question in the following manner:

> "It is immaterial, however, whether the books examined by the Court are obscene. I assume they are, but the ordinance is unconstitutional on its face. It, therefore, makes no difference that it sweeps up the obscene in this case. It is capable of sweeping up the non-obscene as well. The defect in the ordinance is that it permits a type of censorship which depends upon the uncontrolled discretion of the City Council as censor."

The Court continued:

> "The city also urges that the Court should not require the city to license a public nuisance, but this argument is circular and it begs the question of whether traditional nuisance regulation is consistent with the First Amendment right. It is one thing to abate the sale of filthy food and another to abate the sale of filthy books. The food business is not protected by the First Amendment."

Similarly, at bar the Ohio nuisance statute provides in the event that the Court closes the theatre for a sweeping up of the obscene as well as the "sweeping up of the non-obscene."

In Grove Press v Philadelphia, 418 F. 2d 82, the Third Circuit Court of Appeals affirmed the lower court's ruling that the Pennsylvania authorities could not under the theory of nuisance enjoin the showing of the motion picture "I Am Curious - Yellow." The Court stated:

> "The city's attempt to enjoin the continued exhibition of "I Am Curious - Yellow" on the grounds that such an exhibition is a nuisance is a procedure repugnant to the due process clause of the Fourteenth Amendment in two aspects. First, the substance of standard by which the alleged obscenity of the movie is to be judged is so broad as to sweep within its purview constitutionally protected activities; and second, the standard is vague." (See, Grove Press v Philadelphia, 300 F. Supp. 281)

In State ex rel Little Beaver Theatre v Tobin, 259 So. 2d 30, the Appellate Court in Florida ruled that an injunction against the showing of certain films in the future was too broad in scope where it did not have reference to the films seized or to any specific films.

In Mitchum v Florida, 257 So. 2d 883, the Supreme Court of Florida overruled the lower Court which granted a permanent injunction enjoining the Defendants from selling obscene or pornographic materials and permanently enjoining him from further operation or maintenance of the business in the community. The Supreme Court of Florida as stated reversed and declared the injunction invalid in the following manner:

> "A business involved in the dissemination of publications cannot be declared a nuisance in this manner." (Near v Minnesota, supra)

As set forth previously in this memorandum, the Ohio nuisance Statute provides for the complete shut down of the theatre at bar. The statutes permit this Court to put the theatre in question out of business and such action by this Court would constitute a prior restraint against the Plaintiff denying him the right to show whatever movie he chooses to show in the future without having any prior judicial determination as to whether the particular film involved is declared to be constitutionally obscene. As such, the statute in question by its very nature and purpose is invalid and unconstitutional and falls within the boundaries of the rationale of Near v Minnesota, and the other cases as aforecited.

In addition to the prior restraint problem, the Ohio nuisance statute provides no standard whatsoever for a proper judicial determination of whether a motion picture is obscene pursuant to Supreme Court standards. There are no guidelines set out, there are no references to other statutory definitions, there is no way in which the exhibiting of a motion picture could make a prior determination in choice as to whether he wished to show a motion picture film or not to avoid the far-reaching consequences of the Ohio nuisance statute.

In Interstate Circuit, Inc. v Dallas, 398 U.S. 676, the United States Supreme Court set down an ordinance because of the vague and indefinite definition of obscenity given by the ordinance. The hazards of a vague definition as set forth in the Interstate Circuit, case are borne out by the Supreme Court in the following manner:

> "Vagueness and the attended evils we have earlier described, are not rendered less objectionable because the regulation of expression is one of a classification rather than direct suppression."

In the case at bar, the Ohio nuisance statute provides no guidelines whatsoever as to what is "lewd, indecent, lascivious or obscene." (See, 3767.01 O.R.C.)

By comparison the ordinance in Interstate Circuit, at least contained vague guidelines. However, at bar the guidelines to determine what is obscene are totally absent.

Even assuming, that the definition of obscenity as contained in 2905.34 O.R.C. is meant to be absorbed as the defi-

nition in the Ohio nuisance statute, the statute would still be unconstitutionally vague. The definition of obscenity as contained in 2905.34 goes far beyond the definition of obscenity as set forth by the Supreme Court in Redrup v New York, 367 U.S. 154. In either event the statute must fail as being unconstitutionally vague.

In Friedman v Maryland, 380 U.S. 51, the Defendant therein was convicted in the Maryland state court for a violation of a provision in the Maryland movie picture censorship statute making it unlawful to exhibit a film without having obtained a license first. The Defendant contended that the statute in its entirety was unconstitutional and was a prior restraint. On appeal, the Supreme Court of the United States reversed.

The Court in Friedman, premised the reversal on the fact:

> "It is abundantly clear that the Maryland statute provides no assurance of prompt judicial determination."

At bar, the Ohio nuisance statute lacks any assurance of a prompt judicial determination regarding the obscenity of the material in question. At bar, there is absolutely no time limit in which the hearing on the preliminary injunction must be held. Furthermore, there is nothing in the Ohio Appellate Procedure which provides for a speedy and expeditious appeal of an adverse decision to the Plaintiff.

The Court in Grove Press v Philadelphia, supra, also commented on the impropriety of the Pennsylvania nuisance statute:

> "Citing Friedman, the Court also viewed the Pennsylvania procedures in equity as an additional threat to the freedom of expression because they fail to guarantee prompt judicial determination of the First Amendment issue which was the subject of the preliminary restraint."

In Duggan v 807 Liberty, 288 A. 2d 750, the Supreme Court of Pennsylvania overruled the lower court's decision enjoining the showing of a movie pursuant to the nuisance statute because:

> "The Pennsylvania Rules of Civil Procedure simply do not designate when the final hearing must be held subsequent to the granting of a preliminary injunction."

The above-quoted language is readily applicable to the statute at bar.

In Meyer v Austin, 319 F. Supp. 457, the Federal Court declared the Florida obscenity statute unconstitutional in its entirety:

> "Although section 841.011 provides for an expedited trial procedure to minimize incursions on the right of protected expression, the statute makes no provision whatever for the expedited appellate consideration by the District Courts of Appeal. Because no prompt review is specified by law and unwarranted delay can occur before a final decision is reached, and during that delay the evanescent right of freedom on expression might be lost."

Again, by the same token the Ohio nuisance statute does not provide for an expedited appellate consideration by the Ohio appeals courts (See, Louisiana v Gulf States, 255 So. 2d 857).

In conclusion, the Plaintiff requests that this court grant the temporary restraining order as prayed for in the Complaint.

Respectfully submitted,

LAW OFFICES OF JACK GALLON

By_____
Ted Iorio

IN THE UNITED STATES DISTRICT COURT
IN THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

| | | |
|---|---|---|
| William Dakota | ) | C 72-384 |
| Plaintiff | ) | Civil Action No. |
| -vs- | ) | MOTION TO CONVENE A THREE JUDGE PANEL |
| Sheriff Edward Fair, et al | ) | |
| Defendants | ) | |
| | ) | |

Now comes the Plaintiff, by and through his attorney, and requests the court pursuant to 28 U.S.C. 2281 and 28 U.S.C. 2284 to convene a three judge panel.

Respectfully submitted,

LAW OFFICES OF JACK GALLON

By_____
Ted Iorio

IN THE COURT OF COMMON PLEAS OF ALLEN COUNTY, OHIO

| | |
|---|---|
| State of Ohio, ex rel Lawrence S. Huffman<br>Plaintiff<br>-vs-<br>William H. Dakota, et al<br>Defendants | Civil Action No. 72-Civ-0326<br>MEMORANDUM OF LAW ON EFFECT OF REMOVAL ON STATE COURT ACTION |

It is brought to the court's attention that the above-styled action has been removed to the United States District Court for the Northern District of Ohio, Western Division that this memorandum is intended to show the effect of said removal upon the above-styled action.

The filing of a Petition for Removal under the statutes governoring the procedures for removal effects an automatic removal from state court to Federal District Court, and such removal stops any further proceeding in state court pending the District Court's action. 28 U.S.C., Section 1446 (e).

Compliance with the form and procedure of the removal under 28 U.S.C., Section 1446 is all that is necessary to effect automatic removal from the state court to the District Court. Baltimore and Ohio Railroad Company vs Koontz, 104 U.S. 5, 14, 26 L. Ed. 643 (1881); Flowers vs Aetna Casualty and Surety Company, 163 F. 2d 411, 415 (C.A. 6, 1967); Lowe vs Jacobs, 243 F. 2d 432 (CA 5, 1957); Southern Pacific Company vs Haight, 126 F. 2d 900 (CA 9, 1942).

The removal ends the power of the state court to issue any orders because the entire case has been removed. Allman vs Hanley, 302 F. 2d 559 (CA 5, 1962). See also, Adair Pipeline Company vs Pipeliners Local Union #798, 203 F. Supp. 434 (D.C. Texas 1962), aff'd. 325 F. 2d 206 (C.A. 5, 1962). Herein it was held that presentations to the judge of the state court in open court at hearing on the Plaintiff's motion for temporary injunction of a copy of a Petition to Remove the case

to federal court which the judge was obligated to turn over to the clerk of the state court regardless of whether he actually did so, was sufficient compliance by Defendants' attorney with statutory requirement that a copy of the Petition for Removal must be promptly filed with the clerk of the state court and the judge of the state court was on notice that the case had been removed and that he could proceed no further therein. (emphasis supplied).

After compliance with the removal statute the state court is deprived of jurisdiction to proceed with any phase of the litigation. Any issues as to the propriety of removal are federal questions and must be decided in Federal Court. Lowe vs Jacobs, 243 F. 2d 432 (C.A. 5, 1957).

For the above reasons, Defendants have complied with the removal statute, there is respectfully suggested that this court no longer has any jurisdiction in this matter and is without power to proceed further.

Ted Iorio
435 S. Hawley Street
Toledo, Ohio 43609 (419) 248-5351

Gilbert Deitch
Suite 2005
1175 Peachtree Street, N.E.
Atlanta, Georgia 30309 (404) 892-8899

CERTIFICATION

This is to certify that a copy of the foregoing has been mailed this 12 day of December, 1972 to Lawrence S. Huffman, Prosecuting Attorney for Allen County, Ohio, Lima, Ohio.

# Appendix G

*William Dakota v. Sheriff Edward Fair et al.*, (72-384) (being a Civil Rights Action in the United States District Court for the Northern District of Ohio, Western Division)

Papers Included in Appendix: Page

Opinion and Order of United States District Judge Nicholas J. Walinski, dated Nov. 2, 1972 ..... 3-4

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

FILED
NOV 2 1972

| | | |
|---|---|---|
| William Dakota<br><br>Plaintiff,<br><br>vs.<br><br>Sheriff Edward Fair, Sheriff of Allen County, et al.<br><br>Defendants. | ) | C 72-384<br><br>OPINION AND ORDER |

This cause came to be heard on an application for temporary restraining order under Federal Rule of Civil Procedure 65.

The plaintiff herein, operator of a theatre in Lima, Ohio, seeks relief from an order of the Allen County Common Pleas Court pursuant to Ohio Revised Code ₰ 3767.01, et. seq. The theatre and all the equipment necessary for its operation have been padlocked as a nuisance under the procedures set forth in O.R.C. ₰ 3767.04. It is the opinion of this Court that the State injunction has been overbroadly applied. The statute, in pertinent part provides for a temporary injunction:

> "closing the place against its use for any purpose of lewdness, assignation, or prostitution until final decision is rendered on the application for a permanent injunction"

As applied in the instant case, the actions of the State Court fly directly in the face of the United States Supreme Court decision in Near v. Minnesota, 283 U.S. 697(1931). In that case, a similar state statute provided

In conformity with Rule 77 (d) F.R.C.P.
please take notice that the following order of judgment
was entered in this court on NOV 2 1972

Dominic J. Civiso, Clerk

for the total closing of a newspaper for its prior violations of the state statute on libel. The Supreme Court held that such blanket prohibitions were constitutionally impermissible prior restraint of the exercise of free speech.

The Ohio Statute at bar does not present such an issue. Defendant herein is enjoined only from the exhibition of material which falls within the Supreme Court's definition as "obscene" See State ex rel Keating v. Vixen, 27 Ohio St. 2d 278 (1971). It must be assumed that the Ohio Courts will confine the injunction to material held obscene under the tests enunciated by the Supreme Court, and therefore beyond the protection of the First Amendment. Id at 280.

Since the Ohio Court may interpret the above-mentioned statute constitutionally upon hearing for the permanent injunction this Court will reserve a ruling on the convening of a three judge panel under 28 U.S.C. §2284 until such time as the federal abstention doctrine is inapplicable.

For the reasons set out above, it appearing to the Court that the petition for a temporary restraining order is well taken, in part, it is

ORDERED that the state injunction be stayed only so far as it affects the showing of films which have not been held to be obscene in a prior adversary hearing.

UNITED STATES DISTRICT JUDGE

Toledo, Ohio

## Appendix H

*State of Ohio, ex rel Lawrence S. Huffman v. William H. Dakota et al.*, Case No. 72 CIV 0326 (being a Civil Action, in the Court of Common Pleas of Allen County Ohio, to abate the Cinema I Theater as a public nuisance)

Papers Included in Appendix: Page

Motion of Plaintiff Huffman, filed Nov. 5, 1972 ..... 3

Journal Entry of Nov. 5, 1972 ..... 4

IN THE COURT OF COMMON PLEAS OF ALLEN COUNTY, OHIO

STATE OF OHIO, ex rel
LAWRENCE S. HUFFMAN

Plaintiff

vs

WILLIAM H. DAKOTA et al

Defendants

Case No. 72 CIV 0326

MOTION

---

Plaintiff says that on October 24, 1972, the Court ordered the Cinema I Theater, 569 Public Square, Lima, Ohio, closed for the purpose of the projection or screening of lewd, indecent, lascivious or obscene films, and that the defendant, William H. Dakota, was personally served a copy of said Order.

Plaintiff says that the defendant, William H. Dakota, has violated the terms of said Order by exhibiting in said theater on November 4, 1972, obscene motion picture films entitled "Sexual Freedom Now" and "Shoot-Out at Beaver Alls(sic)" which depict numerous scenes of sexual intercourse, cunnilinglus and fellatio.

WHEREFORE, plaintiff requests that the Court direct the defendant, William H. Dakota, to appear before the Court with said motion picture films forthwith so that the Court might determine whether said films are obscene, and upon such determination, to require the defendant to show cause why he should not be punished as for a contempt for his disobedience.

Lawrence S. Huffman, Plaintiff

State of Ohio
SS
County of Allen

Lawrence S. Huffman, being first duly sworn, deposes and says that he has read the foregoing Motion and that the facts and allegations therein contained are true as he verily believes.

Lawrence S. Huffman

Sworn to before me and subscribed in my presence this _____ day of November, 1972.

Notary Public

IN THE COURT OF COMMON PLEAS OF ALLEN COUNTY, OHIO

STATE OF OHIO, ex rel
LAWRENCE S. HUFFMAN

Plaintiff

Case No. 72 CIV 0526

vs

JOURNAL ENTRY

WILLIAM H. DAKOTA et al

Defendants

---

Upon sworn charges filed with the Clerk of Courts against William H. Dakota alleging disobedience of the said William H. Dakota to the former order of this Court directing the non-exhibition of obscene motion picture films at the Cinema I Theater, #69 Public Square, Lima, Ohio, on motion of the plaintiff, a rule is allowed herein against the said William H. Dakota directing him to appear before this court on November 7, 1972, at 9:00 AM, and to bring with him at such time the motion picture films "Sexual Freedom Now" and "Shoot-Out at Beaver Alls(sic)" so that a determination might be made as to whether said films are obscene, and upon such determination, to show cause why he should not be punished as for a contempt for his disobedience.

Judge

THE STATE OF OHIO, } SS
Allen County.

CERTIFICATE OF COPY

I, ROBERT W. [illegible] Clerk of the Court of Common Pleas [illegible] hereby certify that [illegible] is a true and correct copy of the original [illegible] now on file in said Court.

[illegible]

(SEAL)

day of [illegible] D 19[illegible]

[illegible] Clerk

By [illegible] Deputy

# Appendix I

*State of Ohio, ex rel Lawrence S. Huffman v. William H. Dakota et al.*, Case No. 72 CIV 0326 (being a Civil Action, in the Court of Common Pleas of Allen County Ohio, to abate the Cinema I Theater as a public nuisance)

Papers Included in Appendix: Page

Judgment Entry of Court of Common Pleas of Allen County, Ohio, dated Nov. 30, 1972 closing Cinema I Theater for a period of one year unless sooner released by order of court ..... 2-4

IN THE COURT OF COMMON PLEAS OF ALLEN COUNTY, OHIO

| | | |
|---|---|---|
| THE STATE OF OHIO ex rel LAWRENCE S. HUFFMAN | : | |
| Plaintiff | : | CASE NO. 72 CIV 0326 |
| -vs- | : | |
| WILLIAM H. DAKOTA et al | : | JUDGMENT ENTRY |
| Defendant | : | |

.. .. .. .. .. .. .. .. .. .. .. .. .. .. .. .. .. .. .. .. ..

This cause came on to be heard on the plaintiff's verified complaint and amended complaint and application for a permanent injunction, forfeiture of gross receipts received from exhibiting certain motion picture films, and plaintiff's costs, and the Court having considered the same, and having heard and considered the oral and documentary evidence presented, and having considered the arguments of counsel representing the parties, and having considered the evidence received upon plaintiff's motion for temporary (preliminary) injunction, pursuant to Ohio Rules of Civil Procedure 65(B), the Court finds the allegations of plaintiff's complaint and verified complaint are true and more specifically finds as follows:

(1) That the Cinema I Theater is operated by defendant William H. Dakota.

(2) That defendant, William H. Dakota, has engaged in a course of conduct of displaying motion picture films at said Cinema I Theater which are obscene as (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value, all three elements coalescing.

(3) That this conduct and the continuous exhibition

of obscene motion picture films by the defendant constitutes a nuisance as defined by Section 3767.01(C) of the Ohio Revised Code;

(4) That defendants, Flora Mary Collins Moor, Leland Samuel Collins, and Sara Lee Collins (Wallace) are the owners of the premises being used by the defendant, William H. Dakota, to engage in the conduct which constitutes a nuisance;

(5) That during the period beginning the first week of August, 1972, until the issuance of the preliminary injunction on October 24, 1972, the bank records of the defendant, William H. Dakota d/b/a Cinema I Theater disclosed deposits in the amount of

(6) That the defendants, Flora Mary Collins Moor, Leland Samuel Collins, and Sara LeeCollins (Wallace), the owners of the premises at #69 Public Square in Lima, Ohio, leased said premises to the defendant, William H. Dakota, under the name of William Kern, Jr;

(7) That the defendants, John Brownell, Robert Smith, Allen R. Brown, and Geraldine Scott are employed at the said Cinema I Theater;

IT IS THEREFORE ORDERED, ADJUDGED and DECREED as follows:

(1) That the defendants and all of the persons acting in concert or participation with them are hereby permanently enjoined and restrained from conducting the said nuisance;

(2) That the amount of Three Hundred Dollars ($300.00) deposited in the bank account of William H. Dakota d/b/a Cinema I Theater shall be forfeited to the State of Ohio and judgment is hereby rendered against the defendant, William H. Dakota, in said amount; of Three Hundred Dollars ($300.00)

(3) That all personal property and contents used in

conducting the nuisance as aforedescribed shall be removed from #69 Public Square, Lima, Ohio, and this personal property belonging to the defendants shall be sold in the manner provided for the sale of chattels under execution;

(4) That the Order of the Court closing the Cinema I Theater, issued by way of preliminary injunction dated October 24, 1972, shall be extended, and further, the place located at #69 Public Square, Lima, Ohio, and more particularly described as follows:

> Situate in the City of Lima, County of Allen and State of Ohio, and being all of Inlot Number One Hundred and Twenty-seven (127) in the Original Plat of the City of Lima, Ohio, excepting therefrom fifty-four (54) feet, six (6) inches, more or less, off of the entire East end of said lot,

is Ordered closed for any purpose for a period of one year unless sooner released by Order of this Court pursuant to defendant-owners fulfilling the requirements provided in Section 3767.04 of the Revised Code of Ohio.

(5) That the defendant, William H. Dakota, pay the costs herein. Judgment for costs.

To all of which the defendants except.

Judge

THE STATE OF OHIO, Allen County, } SS CERTIFICATE OF COPY

I, ROBERT H. DOUGLAS Clerk of the Court of Common Pleas within and for the aforesaid County and State do hereby certify that the foregoing is a true and correct copy of the original ... now on file in said Clerk's office.

IN ATTESTATION WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Lima, Ohio, this 27th day of November, A.D. 1972

[SEAL]

ROBERT H. DOUGLAS, Clerk

## Appendix J

*Pursue Ltd., a Delaware Corporation v. Lawrence S. Huffman in his capacity as Prosecutor, Allen County, Ohio et al.*, C 72-432 (being a Civil Rights Action in the United States District Court for the Northern District of Ohio, Western Division)

Papers Included in Appendix: Page

Complaint filed Dec. 1, 1972 ..... 3-15

Temporary Restraining Order of United States District Judge Nicholas J. Walinski, filed Dec. 1, 1972 ..... 16

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

| | |
|---|---|
| Pursue, Ltd., a Delaware corporation<br><br>Plaintiff<br><br>-vs-<br><br>Lawrence S. Huffman in his capacity as Prosecutor, Allen County, Ohio<br><br>and<br><br>Edward Fair in his capacity as Sheriff of Allen County, Ohio<br><br>Defendants<br><br>Also serve, in their statutory capacity only, under 28 U.S.C., Section 2284 (2), and not as Defendants<br>His Excellency, John Gilligan, Governor of the State of Ohio, State House Annex Columbus, Ohio<br><br>and<br><br>The Honorable William Brown, Attorney General of the State of Ohio<br>State House Annex<br>Columbus, Ohio | C 72-432<br><br>Civil Action No.<br><br>COMPLAINT FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY AND PERMANENT INJUNCTION, DECLARATORY JUDGEMENT AND CONVOCATION OF THREE-JUDGE COURT |

TO THE HONORABLE, THE JUDGES OF SAID COURT:

Plaintiff, by and through its attorneys-at-law, Ted Iorio, Esquire, Gilbert H. Deitch, Esquire and Robert Eugene Smith, Esquire, complaining of Defendants herein, jointly and severally, respectfully alleges as follows:

I.

JURISDICTION

1. This is a civil action whereby Plaintiff prays a temporary restraining order, and a preliminary and permanent injunction issue to restrain Defendants, and each of them, from acting under the law of Ohio to close Plaintiff's place of business as a "nuisance," as that term is understood under Ohio law, Ohio Revised Code, Sections 3767.01 et seq. Plaintiff prays, as well, a declaratory judgement to determine the constitutionality of the procedures of Defendants to

abate a "nuisance" under said law, as written and/or as applied herein. Plaintiff prays for a three-judge court to make such determination.

2. This is also a civil action whereby Plaintiff prays a temporary restraining order, and a preliminary and permanent injunction issue to restrain Defendants from acting under Sections 3767.01 et seq. of the Ohio Revised Code to prohibit the dissemination of any motion picture films at Cinema I Theatre, 69 Public Square, Lima, Ohio.

3. Jurisdiction is conferred on this court for the resolution of the substantial constitutional questions herein presented by 28 U.S.C., Section 1343 (3), which provides, in pertinent part, that the District Courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

> "To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom, or usage of any right, privilege or immunity secured by the Constitution of the United States. . . .,"

and the organic law which authorizes the institution of this suit founded on 42 U.S.C., Section 1983, which provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and the laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

4. Suit is further founded on 28 U.S.C., Section 1343 (4) "to recover damages or to secure equitable or other relief under any act of Congress providing for the protection of civil rights.....," as well as Article III, Section 2 of the Constitution of the United States.

5. Prayer for Injunctive Relief is founded on Rule 65 of the Federal Rules of Civil Procedure.

6. Prayer for Declaratory Relief is founded on Rule 57 of the Federal Rules of Civil Procedure, as well as 28 U.S.C., Section 2201.

7. Jurisdiction for convocation of a Three-Judge Court is founded on 28 U.S.C., Sections 2281 and 2284.

II.

PARTIES

8. Plaintiff, Pursue, Ltd., is engaged, through its agents, servants and employees, in the dissemination of movies which are presumptively protected under the First Amendment to the Constitution of the United States.

9. The materials disseminated by Plaintiff, Pursue, Ltd., are comparable to those declared not to be obscene by the Supreme Court of the United States, and many other inferior Federal Courts, as well as state appellate courts, and hence, are protected expression under the First Amendment to the United States Constitution. No persons under eighteen (18) years of age (minors) are allowed entrance within Plaintiff's theatre, nor is there "pandering" in the Ginzburg sense, nor are the materials disseminated in such a way that unwilling persons cannot avoid them.

10. Upon information and belief, Lawrence S. Huffman, is named as a Defendant in his capacity as Prosecutor of Allen County, Ohio and as an official authorized by Ohio law to act on behalf of the State of Ohio to abate a "nuisance" pursuant to Section 3767.03 of the Ohio Revised Code.

11. Upon information and belief, Edward Fair is named as a Defendant in his capacity as Sheriff of Allen County, Ohio, having cognizance of the enforcement of the state statutes and having supervisory direction over the members of the Lima Police Department.

12. The named Defendants, in their official capacities only as aforesaid, are joined herein to make enforceable and binding upon them and/or their agents, servants, employees and attorneys, any temporary restraining order, preliminary and permanent injunction, declaratory judgement and/or other order that may issue by this court.

III.

FACTUAL ALLEGATIONS

13. At all times relevant hereto, Defendants and/or their agents, servants or employees, and others acting under their direction and control, and each of them, separately and in concert, under color and pretense of law, to-wit, under color of state statutes referred to hereinabove, have deprived and are continuing to deprive Plaintiff, its agents, servants and employees of rights, privileges and immunities guaranteed to them by the First, Fifth and Fourteenth Amendments to the Constitution of the United States, as well as depriving adult citizens of the City of Lima, the State of Ohio, and visitors thereto, of access to nonobscene materials protected by the First Amendment to the Constitution of the United States, offered for exhibition under nonobtrusive circumstances to interested adults only.

14. Plaintiff adopts by reference and incorporates herein the factual allegations of the Complaint filed with this Court in the case of William Dakota v Sheriff Edward Fair, Docket No. C 72-384, filed October 26, 1972.

15. On November 17, 1972 Plaintiff purchased the interest of William Dakota in Cinema I Theatre and obtained by assignment for valuable consideration all rights and duties of William Dakota as lessee of the premises of 69 Public Square, Lima, Ohio.

16. The purchase and assignment of lease referred to above became effective November 17, 1972 and Pursue, Ltd. commenced to operate Cinema I, 60 Public Square, Lima, Ohio.

17. On November 30, 1972, in the Court of Common Pleas of Allen County, Ohio, the Honorable Robert M. Light, Judge, heard testimony in the case of State of Ohio, ex rel Huffman v William Dakota, et al, No. 72 Civ 0326 upon the State's application for a permanent injunction against Defendants therein.

18. On November 30, 1972 at approximately 2:30 p.m. the Court issued an order of permanent injunction against Defendants thereby ordering the closing of Cinema I for one (1) year and ordering the property therein sold pursuant to Ohio law, Sections 3767.01 et seq. of the Ohio Revised Code. Within two (2) hours the theatre was padlocked and the keys of Plaintiff's employee were seized by law enforcement agents.

19. Notwithstanding this Court's opinion and order entered November 2, 1972 in Dakota vs Fair, et al, No. C 72-384, the Honorable Robert M. Light failed to comply with this Court's opinion as to the impermissibility of Prior Restraints upon Free Speech and Press guaranteed by the First Amendment to the Constitution of the United States, and effectively enjoined the dissemination of any and all motion picture films, whether or not sexually oriented. (Exhibit A)

20. Said nuisance action has imposed a prior and indeed, permanent, restraint, upon the dissemination of materials presumptively protected by the First Amendment to the Constitution of the United States and is designed to have a "chilling effect" upon the exercise of said freedoms by Pursue, Ltd.

21. The Defendants and/or their agents, servants and employees have established a pattern of conduct under color of enforcement of state law, under facially invalid statutes, attemp-

ting the ultimate suppression of presumptively protected motion picture films without, to this date, ever having had any final judicial determination that any of said motion picture films of Plaintiff are, in fact obscene in the constitutional sense, and unless restrained, Defendants and/or their agents, servants and employees will continue to engage in the acts of utilizing nuisance laws, as well as other unconstitutional enactments and conduct that has had the effect of perpetuating a "chilling effect" upon the exercise of Plaintiff's First Amendment rights, as well as the right of interested adult citizens of the City of Lima and the State of Ohio and who wish to exercise their First Amendment right to view nonobscene motion picture films. The efforts on the part of Defendants to close Plaintiff's business and the closure under the guise of the abatement of a nuisance constitute attempts at a constitutionally invalid "prior restraint" which is condemned by the First, Fifth and Fourteenth Amendments to the Constitution of the United States, and which might be apropos in a police state, but is anathema to a free society such as ours.

IV.

BASIS IN LAW FOR RELIEF

22. The aforesaid conduct of Defendants, their agents, servants, employees and attorneys, and others acting under their direction and control, and each of them, in seeking to close Plaintiff's business under the guise of abating a nuisance under the conditions here present is a "prior restraint," condemned by the Constitution of the United States and has a "chilling effect" on the exercise of Plaintiff's constitutional rights, more particularly the First and Fifth Amendments thereof, as made obligatory on the states under the Fourteenth Amendment. The conduct of Defendants, their agents, servants, and employees, in seeking to close Plaintiff's business is deprivation of Plaintiff's rights to due process under the Fifth Amendment to the Constitution, as well as an all-too-effective restraint on the exercise of Plaintiff's right to [illegible] and distribute presumptively protected material

to the interested adult public.

23. As a further result of the conduct of the Defendants, their agents, servants, employees and attorneys, the Plaintiff has been intimidated in its trade and business, and if the business remains closed, it will suffer complete loss of profits, as well as damages as a result of the substantial interference with its advantageous business relations.

24. By reason of the conduct of the Defendants, their agents, servants, employees and attorneys, as aforesaid, the civil rights of Plaintiff under the First, Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution, have been violated to its irreparable harm. Unless enjoined, Defendants, their agents, servants, employees and attorneys, will continue in the course of conduct to Plaintiff's further imminent and irreparable harm, for which it has no plain adequate remedy at law, and the conduct of Defendants, their agents, servants, employees and attorneys, has had and threatens to have a continuing "chilling effect" on the Plaintiff's exercise of its First Amendment freedoms. Immediate and irreparable injury, incalculable loss, and damage will result to Plaintiff if a preliminary injunction is not issued, forbidding Defendants, their agents, servants, employees and attorneys, from continuing in their proposed, wholly illegal conduct as aforesaid, under color of enforcing said state statutes and nuisance laws to Plaintiff.

25. The aforesaid Ohio nuisance law, Section 3767.01 et seq. of the Ohio Revised Code, are as written and/or as applied to Plaintiff, repugnant to the Constitution of the United States for the following reasons.

(a) Said statutory provisions are void for vagueness in that the same prohibit the doing of an act in terms so vague, fluid, and indefinite that men of common intelligence must necessarily guess at the meaning and differ as to the application thereof,

and as such, are repugnant to the Due Process provisions of the Fifth and Fourteenth Amendments to the Constitution of the United States; and further,

(b) Said statutory provisions are void for overbreadth by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms in that the statute and law set forth standards at variance with and insufficient for those minimum standards prescribed by the United States Supreme Court in First Amendment matters; and further,

(c) Said statutory provisions are void for vagueness and impermissible overbreadth, in the area of First Amendment freedom, because the said provisions are susceptible of sweeping and improper application by Defendants and have a "chilling and inhibiting effect" on the exercise of the federal and state constitutional rights of citizens of the State of Ohio and the United States, as well as those of Plaintiff, to publish, disseminate, distribute, circulate, sell, receive and/or purchase movies and printed publications; and further,

(d) Said statutory provisions are repugnant to the substantive Due Process provisions of the Fifth and Fourteenth Amendments to the Constitution of the United States because they permit deprivation of liberty and/or property interests for the exercise of First Amendment rights by unreasonable, arbitrary, and capricious means by Defendants and/or their agents, servants, employees and attorneys without a showing of a real and substantial relationship to any state subordinating interest which is compelling to justify state action limiting the exercise by Plaintiff of First Amendment freedoms; and further,

(e) Said statutory provisions are impermissibly broad and repugnant to the procedural Due Process requirements of the Fifth and Fourteenth Amendments to the Constitution of the United States by employing means lacking adequate safeguards which Due Process demands to assure nonobscene materials sought to be disseminated as a business activity, the constitutional protection

of the First Amendment, to which they are entitled; and further,

(f) Said statutory provisions are vague and impermissibly overbroad and thus repugnant to the First, Fourth, Fifth and Fourteenth Amendments to the United States Constitution in that said provisions permit inherent powers of censorship and suppression, constituting a prior restraint of the exercise of Plaintiff's First Amendment rights by Defendants.

26. Said statutory provisions are repugnant to the First, Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States for the following reasons:

(a) Said statutes as written and/or as applied to Plaintiff constitute a classical "prior restraint," on materials which are presumptively protected under the First Amendment to the Constitution of the United States, which has been condemned by the Supreme Court of the United States in an unbroken string of cases beginning with Near v Minnesota, 283 U.S. 697, 51 S. Ct. 625, 75 L. Ed. 1357 (1931) and continuing through 1971 with its decisions in New York Times Company vs United States, 403 U.S. 713 (1971), and Organization for a Better Austin vs Keefe, 402 U.S. 415, 29 L. Ed. 2d 1 (1971).

(b) Said law of nuisance denies Due Process and Equal Protection of the Laws to Plaintiff in that said law makes a public nuisance of a business, rendering it subject to closure under the guise of abating a nuisance, on the basis of isolated transactions as to a few of possibly thousand of presumptively protected motion picture films without any showing of traditional elements necessary to constitute a continuing public or common nuisance; all of which is repugnant to the First, Fifth and Fourteenth Amendments to the United States Constitution;

(c) Moreover, the Ohio law of nuisance, by labelling a place of business a nuisance on the basis of isolated transactions, creates an invalid presumption of the type condemned by the United States Supreme Court in Leary vs United States, 395 U.S. 6, 89

S. Ct. 1532, 23 L. Ed. 2d 56, in that it violates the Fifth and Fourteenth Amendments of the Constitution of the United States;

(d) Moreover, said presumption deprives Plaintiff of its Fifth and Fourteenth Amendment rights under the Constitution of the United States to have every element making up a nuisance to be proven, by competent evidence, in a First Amendment context, beyond a reasonable doubt.

V.

RELIEF SOUGHT

27. Plaintiff is further entitled to and desires that this Court enter a declaratory judgement on final hearing under the provisions of 28 U.S.C., Section 2201 and Rule 57 of the Federal Rules of Civil Procedure, declaring Ohio nuisance law, Section 3767.01 et seq of the Ohio Revised Code, as written and/or as applied, unconstitutional.

28. Plaintiff is entitled to and desires that a three-judge court be convened to determine the constitutionality of said statute Sections, pursuant to 28 U.S.C., Sections 2231 and 2284.

29. Plaintiff is entitled to and desires that this Court issue a temporary restraining order, a preliminary and permanent injunction restraining and enjoining each of the Defendants, their agents, servants, employees and attorneys, and any and all other persons acting under their direction and control, and each of them, and persons in active concert with them from proceeding against Plaintiff in the action referred to in Paragraph 17 hereof.

WHEREFORE, Plaintiff prays:

1. That a three-judge court be convened to hear and decide the issues raised herein.

2. That a temporary restraining order issue, restraining Defendants, and/or their agents, servants, employees and attorneys, pending a hearing and determination of Plaintiff's application for permanent injunction from continuing to proceed against Plaintiff in the action referred to in Paragraph 17 hereof.

3. That after final hearing, said injunctions be

made permanent and said statute Sections and law of nuisances referred to hereinbefore be declared unconstitutional as written and/or as applied to the controlled dissemination of adult-type erials to persons eighteen (18) years of age or older in a nonobtrusive manner, absent Ginzburg-type pandering, by Plaintiff herein.

4. That a permanent injunction issue restraining Defendants, their agents, servants, employees and attorneys and any and all other persons acting under their direction and control from (a) enforcing or acting under said statute Sections and law referred to above in an unconstitutional manner, or to apply them in a manner to obtain unconstitutional results with respect to this Plaintiff, its agents, servants and employees and (b) otherwise harassing Plaintiff in the conduct of its lawful business without first securing and providing for, after due notice to Plaintiff, a judicially superintended prior adversary hearing on the issue of obscenity, in the constitutional sense.

5. That the Governor and the Attorney General of the State of Ohio be given notice by registered mail of the pendency of Plaintiff's application for preliminary and permanent injunction as required by 28 U.S.C., Section 2284 (2).

6. That Plaintiff have such other and further relief as may be appropriate under the circumstances in this case, together with costs.

Respectfully submitted,

Ted Iorio, Esquire
435 S. Hawley Street
Toledo, Ohio 43609
(419) 248-5351

Gilbert H. Deitch, Esquire
Suite 2005
1175 Peachtree Street, N.E.
Atlanta, Georgia 30309
(404) 892-8890

Robert Eugene Smith, Esquire
Suite 507
102 West Pennsylvania Avenue
Towson, Maryland 21204
(301) 821-6868

COUNTY OF LUCAS)
)SS:
STATE OF OHIO )

AFFIDAVIT

Before me, the undersigned, a Notary Public, in and for the State of Ohio, this 1st day of December, 1972, did personally appear a person known to me to be Gilbert H. Deitch and who is known to me to be Counsel for Plaintiff, Pursue, Ltd., and who, after being duly sworn, did depose and affirm that the allegations of the Complaint are true and correct to the best of his information, knowledge and belief.

Gilbert H. Deitch

Sworn to and subscribed before me, this day of December, 1972.

Notary Public

CERTIFICATE OF SERVICE

This is to certify that on November 30, 1972 at approximately 4:00 p.m., Ted Iorio notified Lawrence S. Eittman by telephone that Gilbert H. Deitch would seek a temporary restraining order before this court on December 1, 1972.

Gilbert H. Deitch

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

FILED
DEC 1 3 54 PM '72

PURSUE, LTD., etc., )
)
Plaintiff, ) No. C 72-432
)
-vs- )
)
LAWRENCE S. HUFFMAN, etc., et al., ) ORDER
)
Defendants. )

* * *

This cause came to be heard on plaintiff's motion for a temporary restraining order pursuant to Rule 65, Federal Rules of Civil Procedure.

The complaint filed herein attacks the constitutionality of Ohio Revised Code, § 3767.01, et seq. It appearing to the Court that the plaintiff has made an attempt to notify the defendants, argument was heard in an ex parte proceeding. To prevent great and immediate irreparable harm to the plaintiff, prior to the convening of a three-judge court in this matter, pursuant to 28 U.S.C., § 2284, it is

ORDERED that the judgment entry of the Allen County Common Pleas Court in Cause No. 72 CIV 0326, dated November 30, 1972, is hereby stayed except insofar as any order which may apply to films that have previously been declared obscene in a prior adversary hearing.

UNITED STATES DISTRICT JUDGE

Toledo, Ohio.

A True Copy
Filed DEC 1 1972
Attest:
By T. L. Kuechle
DEC 1 1972

## Appendix K

*State of Ohio, ex rel Lawrence S. Huffman v. William H. Dakota et al.*, Case No. 72 CIV 0326 (being a Civil Action, in the Court of Common Pleas of Allen County, Ohio, to abate the Cinema I Theater as a public nuisance)

Papers Included in Appendix: Page

Motion of Plaintiff Huffman, filed Dec. 4, 1972 ..... 3

K-3

IN THE COMMON PLEAS COURT OF ALLEN COUNTY, OHIO

| | |
|---|---|
| State ex rel Lawrence S. Huffman<br>PLAINTIFF<br>-vs-<br>William H. Dakota, et. al.<br>DEFENDANTS | CASE NO. 72 CIV 0326<br>MOTION |

Plaintiff requests that the motion picture films located at the premises known as #69 Public Square, Lima, Ohio, the subject of this action, be viewed by the Court and that a judicial determination be made as to whether said films are or are not obscene.

Plaintiff further requests that upon a finding that said films are obscene, the Court order that said films not be exhibited at #69 Public Square, Lima, Ohio.

State ex rel Lawrence S. Huffman

By _____
Attorney for Plaintiff

CERTIFICATE

This is to certify that notice was given of the hearing on this motion set for 10:30 A.M., Monday, December 4, 1972, to Malcolm Basinger, attorney for Flora Mary Collins Moore, Leland Samuel Collins and Sara Lee Collins (Wallace) and Ted Iorio, attorney for the other defendents in this cause and Robert Hollis.

_____
Attorney for Plaintiff

## Appendix L

*William H. Dakota et al., v. State of Ohio, ex rel Lawrence S. Huffman,* C72-445, (being a Removal Action in the United States District Court for the Northern District of Ohio, Western Division)


| Papers Included in Appendix: | Page |
|---|---|
| Petition for Removal, filed Dec. 11, 1972. . . . . | 3-6 |
| Notice of Removal, filed Dec. 11, 1972. . . . . | 7 |
| Motion to Remand, filed Dec. 18, 1972. . . . . | 8-9 |
| Memorandum in Support of on Motion to Remand (less Exhibits A-F) filed Dec. 18, 1972. . . . . | 10-14 |
| First motion for Immediate Hearing, filed Dec. 18, 1972, on Motion to Remand. . . . . | 15-17 |
| Order Designating Three Judge Court, filed Dec. 11, 1972. . . . . | 18-19 |
| Order that Briefs be filed Jan. 15, 1973, filed Dec. 21, 1972. . . . . | 20 |
| Stipulation for Leave to Plead, filed Dec. 27, 1972. . . . . | 21 |

L-3

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
FOR THE WESTERN DIVISION

| | | |
|---|---|---|
| State of Ohio, ex rel Lawrence S. Huffman<br><br>Respondent | ) | C 72-445 |
| -vs- | ) | Civil Action No. |
| William H. Dakota, et al<br><br>Petitioners | ) | PETITION FOR REMOVAL |

W

TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION:

The Petition of William H. Dakota, et al shows:

1. An action was commenced against Petitioners in the Court of Common Pleas, Allen County, Ohio entitled State of Ohio, ex rel Lawrence S. Huffman, Plaintiff against William H. Dakota and Flora May Collins Moor, and Leland Samuel Collins, Sara Lee Collins and Pussycat Corporation and Cinema I Theatre, John DOES and Jane DOES, Defendants, by the service upon them of a Summons and Complaint and Amended Complaint. Further proceedings have been had therein to-wit: two evidentiary hearings which resulted in temporary and permanent injunctions closing Petitioners' business.

2. The above-described action is a civil action which may be removed to this court by the Petitioners, Defendants therein, pursuant to the provisions of 28 U.S.C., Section 1443 in that Petitioners cannot enforce in the courts of the State of Ohio a right under Free Speech and Press Provisions of the Constitution of the State of Ohio in that

(a) Respondent-Plaintiff in the said state court action has brought a Petition to close Petitioners' business which is dissemination of sexually explicit materials which are presumptively protected under the First Amendment of the Constitution of the United States and the Free Speech and Press Provisions of the Constitution of the State of Ohio, to willing adults only under controlled circumstances under which the materials are not thrust

upon the sensibilities of persons unwilling to view them and without "pandering" in the Ginzburg sense;

(b) Said Complaint of Respondent is based on the allegation in the Respondent's Complaint that the Cinema I Theatre operated by Petitioners herein William H. Dakota, et al at premises located at 69 Public Square, Lima, Ohio is a "nuisance."

3. Said action is also removable pursuant to the provisions of 28 U.S.C., Section 1443 in that

(a) Petitioners cannot enforce in the courts of the State of Ohio rights under the First, Fifth and Fourteenth Amendments to the Constitution of the United States to operate their business, which is the dissemination of sexually explicit materials which is presumptively protected under the First Amendment to the Constitution of the United States;

(b) The Court of Common Pleas of Allen County has in the recent past been utilized by the State of Ohio to curtail the exercise of First Amendment freedoms in the guise of abating a nuisance. There is every reason to believe that the procedures employed by Respondent herein acting by and through Prosecutor Lawrence S. Huffman of Allen County will be upheld by the Supreme Court of Ohio, although procedural safeguards to insure that materials entitled to the protection of the First Amendment to the Constitution of United States are not present in the Ohio Nuisance Statutes.

4. Petitioners show that they are alleged to have disseminated obscene materials, but Petitioners show further that there has been no final adjudication of a violation of the Ohio obscenity laws involving Petitioners.

5. Petitioners show that local prejudices have been so inflamed by that court's actions and actions and statements of the Prosecutor of Allen County, that it will be impossible for them to protect their First Amendment rights in the Court of Common Pleas of Allen County.

6. Said action is also removable pursuant to 28 U.S.C., Section 1441 (b) in that it is an action of which the District Courts have original jurisdiction founded on a claim or right arising under the Constitution, treatises or laws of the United States, in that

(a) The District Courts have jurisdiction under 28 U.S.C., Section 1343 to redress violations of the Civil Rights Act against Petitioners, to-wit, a denial of their rights under the First, Fifth and Fourteenth Amendments to the Constitution of the United States;

(b) Petitioners reallege their allegations in paragraph 3 (a) and 3 (b) and paragraphs 4 and 5 and incorporate them as paragraph 6 (b) hereof.

7. Petitioners file herewith a bond with good and sufficient surety conditioned as provided by 28 U.S.C., Section 1446 (d) that they will pay all costs and disbursements incurred by reason of the removal proceedings brought hereby, should it be determined that this action is not removable, or is improperly removed.

WHEREFORE, Petitioners pray that the action now pending againg them in the Court of Common Pleas of Allen County, docket number 72 Civ-0326 be removed to this court for the reasons set out hereinbefore.

Respectfully submitted,

Ted Iorio

Gilbert Deitch
Attorneys for Petitioners

STATE OF OHIO )
)SS:
COUNTY OF LUCAS)

I, Ted Iorio, have read the foregoing and say that the above is true as I verily believe.

Ted Iorio

Sworn to and subscribed before me in my presence this day of December, 1972.

Notary Public

CERTIFICATION

This is to certify that a copy of the foregoing has been mailed this day of December, 1972 to Lawrence S. Huffman, Prosecuting Attorney for Allen County, Ohio, Lima, Ohio.

L-7

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
FOR THE WESTERN DIVISION

State of Ohio, ex rel
Lawrence S. Huffman

Respondent

-vs-

William H. Dakota, et al

Petitioners

C 72-444

Civil Action No.

NOTICE OF REMOVAL

C 72-445

To: Robert H. Dunlap
Clerk of Courts
Allen County Court House
Lima, Ohio

To: Lawrence S. Huffman
Prosecuting Attorney
127 N. Prospect Street
Lima, Ohio 45802

You, and each of you, are hereby notified that on the 11th day of December, 1972 William H. Dakota filed in the District Court for the Northern District of Ohio, Western Division a Petition for Removal of Cause No. 72-Civ-0326 in the Court of Common Pleas of Allen County and entitled State of Ohio, ex rel Lawrence S. Huffman, Plaintiff vs William H. Dakota, et al, Defendants.

Ted Iorio

Dated this 11th day of December, 1972

STATE OF OHIO )
)SS:
COUNTY OF LUCAS)

I, Ted Iorio, being first duly sworn say that the foregoing notice and copy of petition for removal have been hand delivered to Robert H. Dunlap, Clerk of Courts, Allen County Court House, Lima, Ohio and Lawrence S. Huffman, Prosecuting Attorney, 127 N. Prospect Street, Lima, Ohio this 11th day of December, 1972.

Sworn to and subscribed before me in my presence this 11th day of December, 1972.

Notary Public

JUDY M. NAULT
Notary Public
My Commission expires Dec. 8, 1973

L-8

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

| | | |
|---|---|---|
| STATE OF OHIO ex rel LAWRENCE S. HUFFMAN | : | |
| RESPONDENT | : | CASE NO. C 72-445 |
| -vs- | : | MOTION TO REMAND |
| WILLIAM H. DAKOTA, et al | : | |
| PETITIONERS | : | |

.. .. .. .. .. .. .. .. .. .. .. .. .. .. .. .. ..

Respondent respectfully moves the Court for an order remanding this cause to the Court of Common Pleas of Allen County, Ohio, on the ground that the cause was improperly removed and is not within the jurisdiction of this Court for the following reasons:

1. This action is not a civil rights case within 28 U.S.C. Section 1443; and

2. This action is not a civil action within 28 U.S.C. Section 1343; and

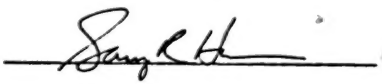
3. Petitioners can effectively and adequately enforce their First Amendment rights to freedom of speech in the state court action.

Respondent further moves the Court for an order directing petitioners to pay to respondent all expenses and disbursements incurred by respondent by reason of the removal proceedings.

Gary R. Hermon
Assistant Prosecuting Attorney
127-129 North Pierce Street
P. O. Box 546, Lima, Ohio 45802
Telephone: (419) 229-0788
ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

This is to certify that the foregoing Motion to Remand was mailed by regular U. S. Mail this 15TH day of December, 1972, to Ted Iorio, 435 South Hawley Street, Toledo, Ohio 43609, and Gilbert Deitch, Suite 2005, 1175 Peachtree Street NE, Atlanta, Georgia 30309, attorneys for petitioners.



IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

| | | |
|---|---|---|
| STATE OF OHIO ex rel LAWRENCE S. HUFFMAN | : | |
| RESPONDENT | : | CASE NO. C 72-445 |
| -vs- | : | |
| WILLIAM H. DAKOTA et al | : | MEMORANDUM IN SUPPORT OF MOTION TO REMAND |
| PETITIONERS | : | |
| | : | |

In their petition for removal, petitioners contend that the suit initiated in the Court of Common Pleas of Allen County, Ohio, is a civil action which may be removed to a Federal District Court pursuant to 28 U.S.C. Sections 1441 (B) and 1443. With regard to petitioners' contention that 28 U.S.C. Section 1443 may be relied upon to remove the state action to the Federal District Court, the decision in State of Ohio, ex rel Robert J. Anderson v. A Motion Picture Film Entitled "Together" et al in Case #C72-28 in the United States District Court for the Northern District of Ohio, Western Division is dispositive of such contention. A copy of said opinion and order is attached hereto, marked Exhibit A and incorporated herein by reference.

The Court, beginning at page 6 of said opinion and order, discussed the question of Federal jurisdiction under 28 U.S.C. 1443 as it related tothe removal of a state action brought under chapter 3767 of the Ohio Revised Code to the Federal District Court. The Court specifically found that the state action could not be removed to the Federal District Court pursuant to 28 U.S.C. 1443. Additional discussion of this contention by the petitioners would seem to be unnecessary.

Petitioners attempt to invoke the provisions of 28 U.S.C. 1441 (B) which provides as follows:

> "Any civil action of which the District Courts have original jurisdiction founded on a claim of right arising under the Constitution, treaties or laws of the United States, shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the state in which such action is brought."

Petitioners contend that 28 U.S.C., Section 1343 specifically creates the original jurisdiction of the federal district court, thus, triggering the removable provisions of Section 1441 (B) at paragraph 6(A) of Petitioners' Petition for Removal -- "The District Courts have jurisdiction under 28 U.S.C. Section 1343 to redress violations of the Civil Rights Act against Petitioners, to-wit, a denial of their rights under the First, Fifth and Fourteenth Amendments to the Constitution of the United States."

Petitioners have carefully couched the above stated allegation in terms clearly intended to fit within the provisions of subparagraph (3) of Section 1343. Subparagraph (3) grants original jurisdiction to federal district courts of any civil action commenced "to redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

To paraphrase petitioners' contention, it is claimed that enforcement of the Ohio Nuisance Statutes, Sections 3767.01 et seq., violates petitioners' constitutional right of free

speech. The record which is available to this Court reveals to the contrary.

Respondent filed a Complaint in the Common Pleas Court of Allen County, Ohio, alleging the existence of a public nuisance at the location known as #69 Public Square, Lima, Ohio; it was further alleged that the public nuisance was the continuous exhibition of obscene motion picture films at said location for which a preliminary and permanent injunction was sought by Respondent.

After an adversary hearing the Common Pleas Court of Allen County, Ohio, on October 24, 1972, issued a temporary injunction, a copy of said Order being attached hereto, marked Exhibit B, and incorporated by reference.

On November 30, 1972, after a hearing, the Common Pleas Court granted a permanent injunction finding that obscene motion picture films had been continuously exhibited at #69 Public Square, Lima, Ohio, and, in accordance with the mandatory provisions of Section 3767.06 of the Revised Code of Ohio, ordered the premises in which the nuisance persisted closed for a period of one year unless the defendant-owners of the realty fulfilled the requirements provided in Revised Code Section 3767.04. A copy of the Court's order is attached hereto, marked Exhibit C and incorporated by reference.

On December 1, 1972, Judge Nicholas Walinski in Case No. C72-432 entitled Pursue Ltd. v. Lawrence S. Huffman, et al, in the United States District Court for the Western District of Ohio, Western Division, granted a temporary restraining order temporarily staying the Common Pleas Court order granted on November 30, 1972, except insofar as any order which may apply

to films that have previously been declared obscene in a prior adversary hearing. (A copy of the temporary restraining order is attached hereto, marked Exhibit D and incorporated by reference). In effect, the temporary restraining order temporarily modified the order of the State Court.

Respondent in a good faith attempt to comply with the federal court order filed on December 4, 1972, a motion in the state case requesting a prior adversary hearing, a copy of which is attached hereto, marked Exhibit E and incorporated by reference. A similar motion was filed thereafter by Respondent which is, also, attached hereto, marked Exhibit F and incorporated by reference.

On December 11, 1972, the day prior to the hearing date set by the Allen County Common Pleas Court to view the motion picture films in a prior adversary hearing to determine whether said films were or were not obscene, Petitioners filed their Petition for Removal, thus, blocking the procedural vehicle deemed by this Court to be the proper method of enforcing the state court order.

Respondent submits that the Petition for Removal is really nothing more than a sham tactic designed to delay Respondent's efforts to abate the exhibition of obscene motion picture films as a public nuisance in the state court.

How can petitioners logically argue that enforcement of Chapter 3767 of the Ohio Revised Code, which has been unequivocally declared constitutional by this Court in Grove Press, Inc. v. Flask, 325 F. Supp. 574 (1970) under standards and utilizing procedures outlined by this Court in Pursue Ltd. v. Lawrence S. Huffman, supra, is in violation of law and denies petitioners constitutional right of free speech. Indeed, if the Court is so inclined, Respondent challenges

Petitioners to exhibit to this Court the motion picture films being exhibited at the premises enjoined so that this Court might determine whether said films are entitled to First Amendment protection.

CONCLUSION

Petitioners have failed to allege any authority for the position that the State Civil action is an action removable under Federal law. The appropriate step to be taken by this Court would be to acknowledge that it does not have jurisdiction over this action pursuant to 28 U.S.C., sections 1441 or 1443; that defendants can effectively and adequately enforce their First Amendment rights to freedom of speech in the State Court action and, sua sponte, remand this civil action to the State Court, and since the removal was a wrongful order, defendants to pay the costs both in this Court and in the State Court.

Respectfully submitted,

Gary R. Hamon
Assistant Prosecuting Attorney
127-129 North Pierce Street
P. O. Box 546, Lima, Ohio 45802
ATTORNEY FOR RESPONDENT

PROOF OF SERVICE

I hereby certify that the foregoing Memorandum in Support of Motion to Remand was mailed by regular U. S. Mail this 15th day of December, 1972, to Ted Iorio, 435 South Hawley Street, Toledo, Ohio, 43609, and Gilbert Deitch, Suite 2005, 1175 Peachtree Street NE, Atlanta, Georgia 30309, attorneys for petitioners.

FILED
DEC 10 9 27 AM '72
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

| | |
|---|---|
| STATE OF OHIO ex rel LAWRENCE S. HUFFMAN | |
| RESPONDENT | CASE NO. C72-445 |
| -vs- | MOTION FOR |
| WILLIAM H. DAKOTA, et al | IMMEDIATE HEARING |
| PETITIONERS | |

.. .. .. .. .. .. .. .. .. .. .. .. .. .. .. .. ..

Respondent respectfully moves the Court pursuant to Rule 6(D) of the Federal Rules of Civil Procedure for an immediate hearing on Respondent's Motion for Remand which is being filed herewith and for leave to serve a copy of his Motion for Remand and Notice of Hearing thereof within five (5) days of the time specified for the hearing.

Good cause exists for this Motion as is clearly set forth in the Memorandum in Support of this motion attached hereto and made a part hereof.

Respectfully submitted,

Gary R. Hoffman
Assistant Prosecuting Attorney
Allen County, Ohio
127-129 North Pierce Street
P. O. Box 546, Lima, Ohio 45802
ATTORNEY FOR RESPONDENT

MEMORANDUM IN SUPPORT OF MOTION FOR IMMEDIATE HEARING ON MOTION FOR REMAND.

This motion is being filed pursuant to Rule 6(D) of the Federal Rules of Civil Procedure which provides in material

part as follows:

> "A written motion other than one which may be heard ex parte and notice of the hearing thereof shall be served not later than five (5) days before the time specified for the hearing unless a different period is fixed by these rules or by Order of the Court. Such an order for cause shown shall be made on ex parte application . . . ."

In September, 1972, respondent filed a complaint in equity in the Court of Common Pleas of Allen County, Ohio, seeking to enjoin the continuous exhibition of obscene motion picture films and to abate the same as a public nuisance in Allen County and in the State of Ohio. The Complaint was filed pursuant to Sections 3767.01 et seq., of the Ohio Revised Code. Respondent further applied for a preliminary injunction which application was heard by the Court of Common Pleas and after due deliberation, the Court did grant a preliminary injunction on October 24, 1972.

On November 30, 1972, the Common Pleas Court of Allen County, Ohio, issued a permanent injunction finding that a nuisance existed at #69 Public Square, Lima, Ohio, and permanently enjoined the exhibition of obscene motion picture films at said location.

On December 1, 1972, this Court issued a temporary restraining order in effect modifying the Common Pleas Court Order and requiring the State Court to hold a prior adversary hearing on obscenity prior to effectively restraining the exhibition of such film. On December 4, the Respondent filed a motion for such a prior adversary hearing and shortly thereafter filed a similar motion which was scheduled for hearing in the State Court for December 12, 1972. On December 11, 1972, the day prior to the State Court hearing which had

been scheduled in compliance with the Federal Court Order Petitioners filed their Petition for Removal herein. Respondent submits that the petition for removal is really nothing more than a sham tactic designed to delay Respondent's efforts to abate the exhibition of obscene motion picture films as a public nuisance in the State Court utilizing those procedures outlined by the Federal Court in a previous temporary restraining order.

Respondent further submits that this matter was awaiting a prior adversary hearing on the obscenity of motion picture films being exhibited at #69 Public Square, Lima, Ohio, time is of the essence, and the matter is pressing. Unless this Court orders an immediate hearing on Respondent's Motion to Remand, Respondent's rights to have the motion picture films being exhibited at #69 Public Square, Lima, Ohio, declared obscene and abated as a public nuisance will be substantially prejudiced and a great injustice will result.

Gary R. [illegible]
Assistant Prosecuting Attorney
Attorney for Respondent

PROOF OF SERVICE

I hereby certify that a copy of the foregoing Motion for Immediate Hearing with attached Memorandum was mailed by regular U. S. Mail this 15th day of December, 1972, to Ted Iorio, 435 South Hawley Street, Toledo, Ohio, 43609 and Gilbert Deitch, Suite 2005, 1175 Peachtree Street NE, Atlanta, Georgia 30309, attorneys for Petitioners.

DESIGNATION

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OHIO

FILED
DEC 11 8:35 AM '72

| | | |
|---|---|---|
| PURSUE, LTD., a Delaware Copr., | ) | No. C 72-432 |
| | ) | Requesting Judge: Honorable |
| Plaintiff | ) | Nicholas J. Walinski |
| | ) | Northern District of Ohio |
| v. | ) | |
| | ) | District Judge: Honorable |
| | ) | Don J. Young |
| LAWRENCE S. HUFFMAN, etc., et al., | ) | Northern District of Ohio |
| | ) | Circuit Judge: Honorable |
| Defendants. | ) | Anthony J. Celebrezze |
| | ) | |

Having been notified by the requesting judge shown above, that the complaint in the above entitled action is one required by an Act of Congress to be heard and determined by a District Court of three Judges, I, Harry Phillips, Chief Judge of the Sixth Circuit, hereby designate the three judges named above to constitute the said Court and to hear and determine this action in accordance with 28 U. S. C. § 2284.

This designation and composition of the three judge court is not a prejudgment, express or implied, as to whether this is properly a case for a three judge rather than a one judge court. This is a matter best determined by the three judge court.

Dated at Cincinnati, Ohio, this 6th day of December 1972.

CHIEF JUDGE, UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

L-20

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

| | | |
|---|---|---|
| PURSUE, LTD., etc., | ) | |
| | ) | |
| Plaintiff, | ) | No. C 72-432 |
| | ) | |
| -vs- | ) | |
| | ) | |
| LAWRENCE S. HUFFMAN, etc., et al., | ) | ORDER |
| | ) | |
| Defendants. | ) | |

* * *

This cause came to be heard on a complaint filed pursuant to 42 U.S.C., § 1983, and 28 U.S.C., § 1343(3),(4); 28 U.S.C., §§ 2281 and 2284.

Having come to the attention of the Court that the parties have agreed that an amended complaint will be filed and that defendant shall have an extension of time until January 6, 1973, within which to file an answer to that pleading as amended, the time within which the answer is required pursuant to Rule 12(a), Federal Rules of Civil Procedure, is hereby extended to the above-mentioned date.

It appearing to the Court that expeditious handling of the instant suit requires the submission of opening briefs prior to convening a three-judge court, pursuant to 28 U.S.C., § 2284, it is

ORDERED that the parties herein file such briefs in support of their respective positions as they might deem helpful to the Court in the consideration of this case. Said briefs to be filed on or before January 15, 1973.

UNITED STATES DISTRICT JUDGE

Toledo, Ohio.

L-21

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

PURSUE, LTD., a Delaware Corporation

PLAINTIFF

-vs-

LAWRENCE S. HUFFMAN et al

DEFENDANT

CASE NO. C 72-432

STIPULATION FOR LEAVE TO PLEAD

.. .. .. .. .. .. .. .. .. .. .. .. .. .. .. ..

We, the attorneys for the respective parties, do hereby stipulate that the plaintiff may file an amended complaint instanter and that the defendants, Lawrence S. Huffman and Edward L. Fair may plead or move to the amended complaint on or before fourteen (14) days from the date of the filing of the same and that the Court may enter an Order accordingly; notice by the Clerk being hereby waived.

Approved:

U. S. District Judge

/S/ Ted Iorio per telephone agreement of 12/21/72

and

/S/ Gilbert H. Deitch per telephone agreement of 12/21/72

ATTORNEYS FOR PLAINTIFF

Lawrence S. Huffman

ATTORNEY FOR DEFENDANTS,
LAWRENCE S. HUFFMAN and
EDWARD L. FAIR

# Appendix M

*Pursue Ltd., a Delaware Corporation v. Lawrence S. Huffman in his capacity as Prosecutor, Allen County, Ohio et al.*, C72-432 (Being a Civil Rights Action in the United States District Court for the Northern District of Ohio, Western Division)

Papers Included in Appendix: Page

Notice of Filing of Amendments, filed Dec. 29, 1972 ..... 3

Amendments to Complaint, filed Dec. 29, 1972 ..... 4-8

Answer to Complaint and Amendments, filed Jan. 5, 1973 (Less Exhibit A) ..... 9-15

M-3

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OHIO

WESTERN DIVISION

| | |
|---|---|
| PURSUE, LTD., a Delaware Corporation | No. C 72-432 |
| - versus - | NOTICE |
| LAWRENCE S. HUFFMAN, et al | |

PLEASE TAKE NOTICE, that the within is a copy of the Amendments to Complaint filed in this action as a matter of course, pursuant to Rule 15(a), Federal Rules of Civil Procedure, on the _____ day of December, 1972.

GILBERT H. DEITCH, Esquire
Suite 2005
One Hundred Colony Square
1175 Peachtree Street N.E.
Atlanta, Georgia, 30309
(404) 892-8890

Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OHIO

WESTERN DIVISION

| | |
|---|---|
| PURSUE, LTD., a Delaware Corporation<br>Plaintiff<br>- versus -<br>LAWRENCE S. HUFFMAN, et al<br>Defendants | No. C 72-432<br>AMENDMENTS TO COMPLAINT |

Pursuant to Rule 15(a), Federal Rules of Civil Procedure, Plaintiff files herein the following amendments to its Complaint:

1. After Paragraph 2:

This is also a civil action whereby Plaintiff prays a judgment for money damages against said Defendants, jointly and severally, both in their official capacities and individually.

2. Add to Paragraph 3: and 42 U.S.C. Section 1985(3) which provides:

> (3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support

or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

3. Amend paragraph 10 to read:

10. Upon information and belief, Lawrence S. Huffman is named as a Defendant individually and in his capacity as Prosecutor of Allen County, Ohio and as an official authorized by Ohio law to act on behalf of the State of Ohio to abate a "nuisance" pursuant to Section 3767.03 of the Ohio Revised Code.

4. Amend paragraph 11 to read:

11. Upon information and belief, Edward Fair is named as a Defendant individually and in his capacity as Sheriff of Allen Coun ty, Ohio, having cognizance of the enforcement of the state statutes and having supervisory direction over the members of the Lima Police Department.

5. Amend paragraph 12 to read:

12. The named Defendants, individually and in their official capacities only as aforesaid, are joined herein to make enforceable and binding upon them and/or their agents, servants, employees and attorneys, any temporary restraining order, preliminary and permanent injunction, declaratory judgment, money damages and/or other order that may issue by this court.

6. Amend paragraph 13 to read:

13. The Defendants and/or their agents, servants and employess have established a pattern of conduct under color of enforcement of state law and customs within the City of Lima, Ohio, of bad-faith law enforcement, under facially invalid statutes and attempting the ultimate suppression of presumptively protected materials without, to this date, ever having had any judicial determination that any of the materials disseminated by Plaintiff are, in fact, obscene in the constitutional sense, and unless restrained, Defendants and/or their agents, servants and employees will continue to engage in the unlawful activities, as well as other unconstitutional conduct that has had the effect of perpetuating a "chilling effect" upon the exercise of Plaintiff's First Amendment rights, as well as the right of interested adult citizens of the City of Lima and the State of Ohio, and of the other forty-nine states who may visit Ohio and who wish to exercise their First Amendment right to view non-obscene films.

7. After paragraph 19 add the following paragraph:

On December 1, 1972 after this Court issued a restraining order at approximately 3:00 p.m., Defendants continued their harassment of Plaintiff by serving subpoenas duces tecum upon the management of Cinema I Theatre in the case of Huffman v. Dakota, after the final judgment had been entered, to produce all the films in the possession of management of Cinema I Theatre.

8. After paragraph 4 of the prayer for relief, add the following paragraph:

That judgment be rendered herein for damages in favor of Plaintiff against Defendants, jointly and severally, in the amount of Fifty Thousand Dollars ($50,000.00).

GILBERT H. DEITCH, Esquire
Suite 2005
One Hundred Colony Square
1175 Peachtree Street, N.E.
Atlanta, Georgia, 30309
(404) 892-8890

CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the opposing party in the foregoing matter with a copy of this pleading by depositing in the United States Mail a copy of same in a properly addressed envelope with adequate postage thereon.

This _____ day of December, 1972.

GILBERT H. DEITCH, Esquire

Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

PURSUE, LTD., a Delaware Corporation

PLAINTIFF

CASE NO. C 72-432

-vs-

LAWRENCE S. HUFFMAN, et al

DEFENDANTS

ANSWER

.. .. .. .. .. .. .. .. ... .. .. .. .. .. .. ..

For their answer to plaintiff's complaint and amendments to complaint, defendants, Lawrence S. Huffman and Edward Fair,

FIRST DEFENSE

1. Deny paragraphs 1 to 7 of plaintiff's complaint and amendments to complaint and specifically deny the jurisdictional allegations alleged by plaintiff.

2. Deny that part of paragraph 8 of plaintiff's complaint and amendments to complaint alleging that plaintiff, Pursue, Ltd., is engaged through its agents, servants and employees in the dissemination of movies for the reason that they are without knowledge or information sufficient to form a belief as to the truth of such averments; deny that said movies are presumptively protected under the First Amendment to the Constitution of the United States; and allege that said movies are obscene.

3. Deny paragraph 9 of plaintiff's complaint and amendments to complaint; allege that the materials disseminated are

are obscene.

4. Admit that part of paragraph 10 of plaintiff's complaint, and amendments to the complaint, alleging that Lawrence S. Huffman is prosecuting attorney of Allen County, Ohio, and authorized under Ohio law to act on behalf of the State of Ohio to abate a nuisance pursuant to Chapter 3767 of the Revised Code of Ohio; and denies each and every other allegation contained in said paragraph 10.

5. Admit that part of paragraph 11 of plaintiff's complaint and amendments to the complaint, alleging that Edward Fair is Sheriff of Allen County, Ohio; and denies each and every other allegation contained in said paragraph 11.

6. Deny paragraph 12 of plaintiff's complaint and amendments to the complaint.

7. Deny paragraph 13 of plaintiff's complaint and amendments to the complaint and allege that plaintiff has been and is exhibiting obscene motion picture films in Lima, Ohio, which are not entitled to First Amendment protection and, further, that acts of the defendants intended to enforce state law, to wit: Ohio Revised Code Section 3767.01 et seq., were done in reliance on decisions of the United States District Court, Northern Division, namely, Grove Press, Inc., v. Flask, 326 F Supp 574, and Marks v. Huffman et al, Case No. C 72-193, specifically finding Ohio Revised Code Sections 3767.01 et seq., constitutional, and in compliance with the temporary restraining order issued by this Court herein.

8. Move to strike paragraph 14 in its entirety for the reason that the plaintiff in William Dakota v. Sheriff Edward

Fair, Docket No. C 72-384, United States District Court, Northern Division, is not a party herein, and further, that any claim of an infringement of the constitutional rights of plaintiff William Dakota is a personal right and therefore, neither transferable or assignable; defendants, in the alternative, deny each and every allegation contained in said complaint and amendments to the complaint.

9. Deny paragraph 15 of plaintiff's complaint and amendments to the complaint, for the reason that they are without knowledge or information sufficient to form a belief as to the truth of such averments; and specifically deny that the personal constitutional rights of William Dakota are assignable.

10. Deny paragraph 16 of plaintiff's complaint and amendments to the complaint for the reason that they are without knowledge or information sufficient to form a belief as to the truth of such averments.

11. Admit paragraph 17 of plaintiff's complaint and amendments to the complaint.

12. Admit paragraph 18 of the plaintiff's complaint and amendments to the complaint.

13. Deny paragraph 19 of plaintiff's complaint and amendments to the complaint, and allege that the Honorable Judge Robert M. Light did in Case No. 72 CIV 0326 in the Court of Common Pleas of Allen County, Ohio, entitled The State of Ohio ex rel Lawrence S. Huffman v. William H. Dakota, et al, on November 30, 1972, issue the order marked Exhibit A and attached to plaintiff's complaint; that said order contained specific findings that the continuous exhibition of obscene

motion picture films constituted a nuisance as defined by Section 3767.01(C) of the Ohio Revised Code; that the defendants named therein and all of the persons acting in concert or participation with them were permanently enjoined and restrained from conducting such nuisance; that several of the defendants named therein together with plaintiff in this action through its agents, servants, and employees, did violate the order of the state court by continuing to exhibit obscene motion picture films; and that in compliance with the order of this Court requiring a prior adversary hearing issued by way of a temporary restraining order herein on December 1, 1972, plaintiff, Lawrence S. Huffman, did on December 1, 1972, cause a subpoena duces tecum to be issued and served upon Robert Smith, a defendant in the State case, and Robert Hollis, a person acting in concert or participation with said Robert Smith, requiring production and exhibition of motion picture films in their possession for the purpose of conducting a prior adversary hearing, all in a good faith attempt to enforce the injunction issued by the State court in State of Ohio ex rel Lawrence S. Huffman v. William Dakota, et al.

14. Deny paragraph 20 of plaintiff's complaint and allege that "materials" alleged to be protected under the First Amendment are, in fact, obscene motion picture films not entitled to First Amendment protection, and further allege that the plaintiff which purports to be a corporation is not entitled to invoke protection under the First Amendment for the reason that the right of free speech is a personal right and not available to a corporation.

15. Deny paragraph 21 of plaintiff's complaint and amendments to the complaint, and allege that all acts of defendants have been in good faith and in reliance upon the decisions of the United States District Court, Northern Division, upholding the constitutionality of Section 3767 et seq., of the Ohio Revised Code, as set forth in paragraph 7 of defendant's answer herein, and in compliance with the temporary restraining order of this Court requiring a prior adversary hearing; that on December 4, 1972, the Court of Common Pleas of Allen County, Ohio, viewed the motion picture "Sexual Freedom in Denmark" but that the Court withheld making a judicial determination as to obscenity at the request of Ted Iorio, counsel for plaintiff herein, so that said counsel could present additional evidence relative to the issue of the obscenity of said film; that the Court of Common Pleas of Allen County, Ohio, withheld its decision until December 12, 1972, at which time the prior adversary hearing was to be reconvened; that on December 11, 1972, the day prior to the reconvening of the prior adversary hearing in the Allen County Common Pleas Court, Ted Iorio and Gilbert Deitch, attorneys for plaintiff herein, filed in this Court in Case No. C 72-445 entitled State of Ohio ex rel Lawrence S. Huffman v. William Dakota, et al, a petition for removal effectively terminating the jurisdiction of the Court of Common Pleas of Allen County, Ohio, in the same entitled case and in which the prior adversary hearing had been scheduled; that counsel for the plaintiffs have intentionally and wrongfully used the federal judicial process to avoid any judicial determination as to obscenity of the films by the state court; that

if there is any infringement of plaintiff's First Amendment rights arising out of the lack of any final judicial determination as to the obscenity of motion picture films, it resulted from the acts and conduct of plaintiff's counsel rather than any conduct of defendants herein; and that plaintiff's First Amendment rights are not being violated for the reason that the motion pictures exhibited by plaintiff are obscene and, further, that plaintiff, in its corporate capacity cannot avail itself of the personal right of freedom of speech as set forth in the First Amendment.

16. Deny paragraphs 22-26 of plaintiff's complaint and amendments to the complaint, and allege that plaintiff in its corporate capacity cannot avail itself of the personal right of freedom of speech as set forth in the First Amendment, that the motion picture films exhibited by plaintiff are obscene and, thus, not entitled to First Amendment protection; that the Ohio Nuisance Statutes, Section 3767.01 et seq., of the Ohio Revised Code are constitutional; and that any lawful act in furtherance of the enforcement of said Ohio Nuisance Statutes, which have been held constitutional by this Court and in compliance with the temporary restraining order issued herein cannot be deemed violative of plaintiff's constitutional rights.

SECOND DEFENSE

1. Incorporate by reference paragraphs 1-16 of their First Defense herein.

2. Move to dismiss plaintiff's complaint and amendments to the complaint for failure to state a claim upon which relief

can be granted.

THIRD DEFENSE

1. Incorporate by reference paragraphs 1-16 of their First Defense herein.

2. Allege that any acts or conduct of defendants directed at plaintiff or its agents were in good faith and in the exercise of their offices.

Respectfully submitted,

Lawrence S. Huffman
Prosecuting Attorney
ATTORNEY FOR DEFENDANTS
LAWRENCE S. HUFFMAN AND
EDWARD L. FAIR

PROOF OF SERVICE

I hereby certify that a copy of the foregoing Answer was mailed to attorneys for plaintiff herein, Gilbert H. Deitch, Suite 2005, One Hundred Colony Square, 1175 Peachtree Street N.E., Atlanta, Georgia, 30309, and Ted Iorio, 435 South Hawley Street, Toledo, Ohio 43609, on the 4th day of January, 1973, by regular U. S. Mail.

Lawrence S. Huffman

## Appendix N

Trial Brief of Defendants *Huffman et al. in Pursue Ltd., a Delaware Corporation v. Lawrence S. Huffman in his capacity as Prosecutor, Allen County, Ohio et al.*, C72-432) (Being a Civil Rights Action in the United States District Court for the Northern District of Ohio, Western Division)


| Papers Included in Appendix: | Page |
|---|---|
| Point Number 3 of Trial Brief, filed Jan. 16, 1973 | 3-7 |
| Affidavits of Deputy Sheriff Hawk (Incorporated in Trial Brief) Re viewing of "Skin Flick Madness" and "Okie Maid" on Dec. 7, 1972 | 8 |
| Re viewing of "The Honeymoon Is Over" and "Brit Blazer" on Dec. 14, 1972 | 9 |
| Re viewing of "Bells, Books and Balls" and "Mother Knows Best" on Dec. 30, 1972 | 10 |
| Re viewing of "The Hedonist-Hypnotist" and "Documentary of a Madam" on Jan. 10, 1972 | 11 |

An assignment of the lease may transfer the lessee's entire interest in the demised premises for the unexpired term of the original lease to the assignee, but, clearly, the personal right of the lessee to freedom of speech is a constitutional right, and thus, non-assignable. The constitutional rights claimed to be infringed upon, therefore, must be those of the assignee-plaintiff, Pursue, Ltd., and not that of the assignor-lessee, William H. Dakota.

Defendant contends that Pursue, Ltd., which represents itself to be a Delaware Corporation is not a "person" within the meaning of that term as used in the Fourteenth Amendment. The Fourteenth Amendment provides in part that no State shall deprive "any person of life, liberty, or property, without due process of law." In Northwestern National Life Insurance Co., v. Riggs, 203 US 243, 27 S. Ct. 126 (1906) the Supreme Court held that corporations cannot be deprived of "liberty" under the Fourteenth Amendment but that the term "liberty" applied to natural persons only. Even if "person" could be construed to include corporations, defendants contend that Sections 3767.01 et seq., of the Ohio Revised Code provide procedural devices which were available to plaintiff in the State court on the date of the alleged assignment and are still available to litigate those questions raised in this suit. Plaintiff's claim, therefore, that its liberty has been deprived without due process of law is without merit.

POINT NUMBER THREE

Defendants contend that plaintiff must establish that defendants' attempts to enforce Sections 3767.01 et seq., of the Ohio Revised Code are (1) in bad faith, (2) harassment, and

(3) cause great and immediate irreparable injury.

Even if Sections 3767.01 et seq., of the Ohio Revised Code were unconstitutional on their face, the Supreme Court has consistently held, as recently as February, 1971, that "possible unconstitutionality of a statute on 'its face' does not of itself justify injunction against good faith attempts to enforce it" absent bad faith, harassment, great and immediate irreparable injury, or other extraordinary circumstances. Younger v. Harris, 91 S. Ct. 746, 755.

Defendants contend that the nuisance suit was initiated in the State court in reliance upon the decisions of the United States District Court, Northern District in Grove Press, Inc., v. Flask, 326 F. Supp 574, and Marks v. Huffman, et al, Case C 72-193 (See Appendices O and P) upholding the constitutionality of said statutes; that enforcement of the State Court s orders issued in the state nuisance action was in good faith and in reliance upon the constitutionality of the statutory procedures of said statutes; and that when ordered by the Federal District Court to provide prior adversary hearings to determine the obscenity of motion picture films at the Cinema I Theater, defendant, Lawrence S. Huffman, did in good faith attempt to comply with said federal court order and still enforce the state court order by requesting such an adversary proceeding. Plaintiff cannot prove, as no such proof exists, that defendants ever prosecuted the state action in bad faith with no expectation of obtaining a valid conviction.

The "harassment" element as envisioned by the Supreme Court in Dombrowski v. Pfister, 380 U.S. 479, 85 S. Ct. 1116, is totally absent in this cause.

The evidence will demonstrate: (1) that defendants have not "harassed" plaintiff or its agents within the meaning of that term as enunciated by the Court in Dombrowski v. Pfister, 380 U.S. 479, supra, and later cases; (2) that defendants have not undertaken civil and criminal prosecution against plaintiff and his agents "in bad faith and without hope of obtaining a valid conviction"; (3) that plaintiff has not suffered "great and immediate irreparable injury" as envisioned by the Court in Younger v. Harris, supra, and other pertinent Supreme Court decisions.

Dombrowski, supra, presented the Court with a factual pattern of a continuous series of physical acts and threats committed by state officials against the plaintiffs therein. This continuous pattern of acts and threats became the framework of the "harassment" requirement for federal intervention under the Civil Rights Act where the "harassment" was designed not for good faith prosecution with an expectancy of conviction, but in "bad faith and without hope of obtaining a valid conviction" in the State court.

In Dombrowski, supra, notwithstanding a state court order quashing warrants and suppressing evidence, plaintiffs offered to prove threats of additional prosecution under the same statute by the State obtaining indictments using copies of the illegally seized evidence and conducting public hearings at which copies of the illegally seized documents were used.

In the present case defendants believe the evidence will show that no conditions exist whatsoever from which one might infer that defendants did not expect a valid conviction. None of the elements present in Dombrowski, supra, or even analagous elements can be found in this case.

In order for plaintiff to prevail herein plaintiff must establish that the danger of irreparable injury is both great and immediate. Ex Parte Young, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714; Younger v. Harris, supra.

"Certain types of injury in particular, the cost, anxiety, and inconvenience of having to defend against a single prosecution, could not by themselves be considered 'irreparable' in the special legal sense of that term. Instead, the threat to the plaintiff's federally protected rights must be one that cannot be eliminated by defense against a single criminal prosecution." Younger v. Harris, supra, p. 751.

Plaintiff will undoubtedly argue that a substantial loss of or impairment of freedom of expression will occur if the state court order is not dissolved or modified to the extent that enforcement of state court's order is unenforceable, and this loss or impairment of freedom of expression is his irreparable injury.

A close examination of the facts of the present case, however, reveal to the contrary. In Roth v. United States, 354 U.S. 476, 485, 77 S. Ct. 1304, 1309, IL Ed. 2d 1498 (1957), the Supreme Court stated: "We hold that obscenity is not within the area of constitutionally protected speech or press." Clearly, Roth remains the law of the land. Therefore, if the films exhibited at the Cinema I Theater by plaintiff are obscene, plaintiff cannot claim either a loss or impairment of freedom of expression as irreparable injury since obscenity is not within the area of constitutionally protected expression.

Attached hereto as Appendices Q, R, S and T are affidavits of a deputy sheriff who has viewed motion picture films exhibited by plaintiff since this Court ordered the re-opening of the

Cinema I Theater.

The attached affidavits clearly show that plaintiff has continuously exhibited obscene motion picture films at the location already deemed a public nuisance by the State court.

Plaintiff has filed a spurious lawsuit in the federal district court without pursuing any remedy available in the State court for the sole purpose of continuing the exhibition of obscene motion picture films and deriving as much income as possible from their exhibition. Defendants contend that plaintiff's conduct is a flagrant abuse of the federal court system.

POINT NUMBER FOUR

Defendant Lawrence S. Huffman contends that plaintiff's complaint and amendments to the complaint do not state a cause of action upon which relief can be granted for the reason that defendant is immune from suit as a matter of law by reason of his position as prosecuting attorney of Allen County, Ohio, and the quasi-judicial nature of his acts.

This question was squarely placed before this Court in Robert Boyd v. Lawrence S. Huffman, et al, in Civil No. C 70-296. In that case the prosecuting attorney prepared and assisted in the execution of a search warrant which resulted in the seizure of an obscene motion picture film without first conducting a prior adversary hearing as to the film's obscenity. Judge William J. Young's opinion is attached hereto as Appendix U. At page 3 of his opinion Judge Young stated: "It has long been recognized in this Circuit that a prosecuting attorney is a quasi-judicial officer and enjoys the same immunity from a civil action as that which protects a judge acting within his jurisdiction.

# A F F I D A V I T

STATE OF OHIO
SS:
COUNTY OF ALLEN

FRED H. HAAK, being first duly sworn, says that he is a Deputy Sheriff of Allen County, Ohio, that on December 7, 1972, he paid $3.00 and was admitted to the Cinema I Theatre, #69 Public Square, Lima, Ohio, and that he viewed two motion pictures entitled "Skin Flick Madness" and "Okie Maid".

Affiant says that the credits of "Skin Flick Madness" showed that it was produced by "Suckit Films"; that the general theme of the movie centered about a male and female viewing a stag film, becoming excited by the various sexual acts depicted in the stag fil and engaging in sexual activity themselves during the stag film; and that the movie lasted approximately 55 minutes during which time nude males and nude females were depicted on the screen engaging in several explicit acts of fellatio, sexual intercourse, lesbianism and cunnilingus.

Affiant says that the second feature was entitled "Okie Maid" which lasted approximately 50 minutes; that the general theme of the movie centered about the sexual activities of three men who lived together in a mountain shack; and that the movie had several explicit scenes of nude males and nude females engaged in acts of lesbianism, cunnilingus, female masturbation, group sex, sexual intercourse, rape, fellatio and anal sodomy.

Further affiant saith not.

Fred H Haak

Sworn to before me and subscribed in my presence, this 15TH day of January, 1973.

Notary Public

# AFFIDAVIT

STATE OF OHIO
SS:
COUNTY OF ALLEN

FRED H. HAWK, being first duly sworn, says that he is a Deputy Sheriff of Allen County, Ohio; that on December 14, 1972, he paid $3.00 and was admitted to the Cinema I Theatre, #69 Public Square, Lima, Ohio; and that he viewed two motion pictures entitled "The Honeymoon Is Over" and "Brit Blazer".

Affiant says that the first feature he viewed was entitled "The Honeymoon Is Over" which lasted approximately one hour; that the general theme of the movie centered about the sexual frustrations and inadequacies of a newly married couple; and that the motion picture contained several explicit scenes of nude males and nude females engaged in acts of sexual intercourse, cunnilingus, lesbianism and fellatio.

Affiant further says that he viewed the second motion picture entitled "Brit Blazer" which lasted approximately one hour; that the general theme of the movie centered about the kidnapping of a female and her rescue by a female secret agent, Brit Blazer; that the feature contained several explicit scenes of nude males and nude females engaged in acts of fellatio, lesbianism and cunnilingus.

Further affiant saith not.

Fred H Hawk

Sworn to before me and subscribed in my presence, this 15TH day of January, 1973.

Notary Public

AFFIDAVIT

STATE OF OHIO
SS:
COUNTY OF ALLEN

FRED H. HANK, being first duly sworn, says that he is a Deputy Sheriff of Allen County, Ohio; that on December 30, 1972, he paid $3.00 and was admitted to the Cinema I Theatre, #6 Public Square, Lima, Ohio; and that he viewed two motion pictures entitled "Bells, Books and Balls" and "Mother Knows Best".

Affiant says that the first feature he viewed was entitled "Bells, Books and Balls" which lasted approximately one hour; that there was no general theme of the movie ascertainable by affiant; and that the movie contained several explicit scenes of nude males and nude females engaged in acts of group sex, sexual intercourse, lesbianism, fellatio and cunnilingus.

Affiant says that he viewed the second feature entitled "Mother Knows Best" which lasted approximately one hour; that the general theme of the movie centered about the sexual adventures of a mother and daughter travelling to the west coast; that the film contained several explicit scenes of nude males and nude females engaged in acts of sexual intercourse, lesbianism and cunnilingus.

Further affiant saith not.

Fred H Hank

Sworn to before me and subscribed in my presence, this 15TH day of January, 1973.

Notary Public

N-11

A F F I D A V I T

STATE OF OHIO
SS:
COUNTY OF ALLEN

FRED H. HANK, being first duly sworn, says that he is a Deputy Sheriff of Allen County, Ohio; that on January 10, 1973, he paid $3.00 and was admitted to the Cinema I Theatre, #69 Public Square, Lima, Ohio; and that he viewed two motion picture films entitled "The Hedonist-Hypnotist" and "Documentary of a Madam".

Affiant says that the first motion picture he viewed was entitled "The Hedonist-Hypnotist" which lasted approximately one hour; that the general theme of the feature centered about the use of hypnosis to effectuate sexual relations; and that the movie contained several explicit scenes of nude males and nude females engaged in acts of sexual intercourse, fellatio, cunnilingus, and group sex.

Affiant says that he viewed the second feature entitled "Documentary of a Madam" which lasted approximately one hour; that the general theme of this feature centered about the activities of a brothel; and that the movie contained several explicit scenes of nude males and nude females engaged in acts of sexual intercourse, fellatio, cunnilingus and lesbianism.

Further affiant saith not.

Fred H Hank

Sworn to before me and subscribed in my presence, this 15TH day of January, 1973.

Notary Public

## Appendix O

*Pursue Ltd., a Delaware Corporation v. Lawrence S. Huffmen in his capacity as Prosecutor, Allen County, Ohio et al.*, C72-432 (being a Civil Rights Action in the United States District Court for the Northern District of Ohio, Western Division)


| Papers Included in Appendix: | Page |
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| Motions to Dissolve Temporary Restraining Order and to Dismiss, filed Feb. 12, 1973. . . . . | 3 |
| Memorandum in Support of Motions to Dismiss and Dissolve T.R.O. (Less Exhibits A, B and C) which appear at Appendices P, Q and R), filed Feb. 12, 1973. . . . . | 4-8 |
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| Memorandum in Support of Motion for Immediate Hearing, filed Feb. 12, 1973 . . . . . | 10-12 |
| *William H. Dakota v. Huffman, et al.*, C72-445. (Being a Removal Action in the United States District Court for the Northern District of Ohio, Western Division) | |
| Second Motion for Immediate Hearing, filed on Feb. 12, 1973, on Motion to Remand, filed Dec. 18, 1972. . . . . | 13-16 |
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

| | | |
|---|---|---|
| PURSUE, LTD., et al | : | |
| Plaintiff | : | CASE NO. C 72-432 |
| -vs- | : | MOTIONS TO DISSOLVE TEMPORARY RESTRAINING ORDER AND TO DISMISS. |
| LAWRENCE S. HUFFMAN, et al | : | |
| Defendant | : | |
| | : | |

.. .. .. .. .. .. .. .. .. .. .. .. .. .. .. .. .. .. .. .. ..

Defendants, Lawrence S. Huffman and Edward L. Fair, move the Court for an Order dissolving the Temporary Restraining Order issued hereon on December 1, 1972, for the reason that the Temporary Restraining Order was issued without notice ex parte and has exceeded 10 days without an extension in accordance with law, and further, for the reason that Plaintiff cannot show that a state court order prohibiting exhibition of motion pictures at the premises known as Cinema I Theatre, #69 Public Square, Lima, Ohio, causes great and immediate irreparable injury, loss or damage to plaintiff as evidenced by the attached affidavits and time-motion studies in Defendants' Memorandum.

Defendants, Lawrence S. Huffman and Edward L.Fair, further move the Court for an Order dismissing Plaintiff's Complaint for the reason that it is a sham pleading brought in bad faith and to permit further cognizance thereof would only perpetuate the fraud already thrust upon the Court by Plaintiff and the resultant gross abuse of the federal judicial process, all as evidenced by the attached exhibits in Defendants' Memorandum.

Respectfully submitted,

Lawrence S. Huffman
Prosecuting Attorney, Allen County, Ohio

Gary R. Hermon
Assistant Prosecuting Attorney

ATTORNEYS FOR DEFENDANTS,
LAWRENCE S. HUFFMAN AND EDWARD L. FAIR

MEMORANDUM

Defendants contend the temporary restraining order issued herein on December 1, 1972, should be dissolved for the reason that it was issued without notice ex parte and has exceeded 10 days without an extension in accordance with law.

Rule 65(b) of the Federal Rules of Civil Procedure provides in part: "Every temporary restraining order granted without notice . . . shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period."

Clearly, the temporary restraining order issued herein was without notice; indeed, the order states "that the plaintiff has made an attempt (my emphasis) to notify the defendants." As a matter of fact, when defendants were notified that suit had been filed against them, Gary R. Hermon, one of the counsel for defendants, called the Court and spoke to one of the law clerks of the Court. At that time counsel specifically requested that he be notified as he wished to appear if the Court was going to consider plaintiff's application for a temporary restraining order. Counsel was informed that he would be so notified; counsel for defendants learned days later that the order had been issued ex parte and he did not receive notice.

The record shows that over 60 days have elapsed since issuance of said order. The record further shows the order has not been extended nor have defendants consented to any extension thereof.

Defendants are entitled to dissolution of the temporary restraining order on this basis alone.

Further, the basis for the issuance of said order, to wit: "to prevent great and immediate irreparable harm to the plaintiff" as alleged

by plaintiff was false and fraudulent. Attached hereto and incorporated by reference are Exhibits A, B, and C which are affidavits of persons who have seen the motion pictures exhibited by plaintiff at the Cinema I Theatre, #69 Public Square, Lima, Ohio, for three successive weeks, January 10 - 30, 1973, together with photographic reductions of time-motion studies of said motion picture films. (Taped recordings have been made of said films and will be available at the hearing of defendants' motions.) (A copy of the said time-motion studies are not attached to copies of said motions served upon counsel for plaintiff as only one copy is presently available; said time-motion studies are available to plaintiff's counsel in the Clerk's Office, having been previously filed herein.)

The gist of plaintiff's contention that plaintiff would sustain great and immediate irreparable harm was that defendants would actively seek through the state court to interfere with the exhibition of "constitutionally protected" motion picture films at the Cinema I Theatre. Plaintiff's representations to the Court were false and fraudulent as evidenced by the attached exhibits. Plaintiff has consistently and continuously exhibited obscene motion picture films at said theatre, therefore, plaintiff cannot sustain the great and immediate irreparable injury which must be the -basis of the temporary restraining order as obscenity is not constitutionally protected. Since plaintiff cannot suffer the requisite injury, plaintiff cannot be entitled to the relief sought and the temporary restraining order must be dissolved.

Defendants further contend that this Court can and should dismiss plaintiff's complaint for the reason that it is a sham pleading brought in bad faith; that it is a fraudulent action which, when combined with the petition for removal filed with this Court in Case No. C 72-445, constitutes a gross abuse by plaintiff of the federal judicial process.

"A sham pleading is defined as one that while in good form is

is false in fact, or one good in form but false in fact and not pleaded in good faith." 61 Am Jur 2d, Pleading, Section 26, page 474.

"It has always been held that by virtue of its inherent power, the court has authority by summary means to prevent an abuse of its processes and peremptorily to dispose of causes of action or defenses that are sham, frivilous, or wholly vexatious." 61 Am Jur 2d, Pleading, Section 211, page 631.

As related earlier in this Memorandum, plaintiff's basis for obtaining a temporary restraining order, indeed, the basis for the entire lawsuit is that defendants have in the past and will continue in the future to interfere with the presentation of "constitutionally protected" motion picture films at the Cinema I Theatre, #69 Public Square, Lima, Ohio, by plaintiff. While plaintiff's complaint is "in good form", it is "false in fact" as evidenced by Exhibits A, B, and C. Plaintiff has used the federal judicial process fraudulently (1) by filing a complaint claiming that it was exhibiting "constitutionally protected" films; (2) by obtaining a temporary restraining order on the same basis and falsely representing a fear of great and immediate irreparable harm which, of course, can't be sustained since the films are obscene; and (3) by filing a sham petition for removal in this Court in Case No. C 72-445 thereby terminating the jurisdiction of the state court when defendant Huffman attempted to comply with this Court's order and afford plaintiff a prior adversary hearing as to obscenity.

Plaintiff's complaint was not brought in good faith as evidenced by the continuous exhibition of obscene films and the filing of the petition for removal one day before the prior adversary hearing to determine obscenity in the state court under the guidelines of the federal order.

Defendants need not dwell upon the obscenity of the motion picture films exhibited by plaintiff at the subject premises. Exhibits A, B, and C speak for themselves. The depths to which the pornography peddlers like

plaintiff have fallen in the area of obscene motion pictures is perhaps best illustrated by the language used by the Court of Appeals for Lucas County in State ex rel Ewing v. "Without a Stitch", 25 O App 2d 107 at page 112:

> By any test, medium core, hard core, as it res ipsa loquitur, obscenity per se, patently obscene, or screaming obscenity, the film (Without a Stitch) was obscene."

The film "Without a Stitch" couldn't qualify as a cartoon at the Cinema I Theatre where plaintiff daily exhibits obscene films many times over more sexually explicit.

To permit plaintiff to persist in such conduct, and more importantly, to abuse the federal judicial process in the manner above described, while it continues to commercially exploit sex under the pretense of freedom of expression would be contrary to law, an injustice to the people of the State of Ohio in whose name the state action was brought, and a reward to those who clearly are violating the law and knowingly abusing the federal court system for so doing.

Plaintiff's suit is a sham as demonstrated by its conduct, and, accordingly, should be dismissed.

Respectfully submitted,

Lawrence S. Huffman
Prosecuting Attorney
Allen County, Ohio
127-129 North Pierce Street
P. O. Box 546, Lima, Ohio 45802
Telephone: (419) 229-0786

and

Gary L. Harmon
Assistant Prosecuting Attorney
Allen County, Ohio

ATTORNEYS FOR DEFENDANTS
LAWRENCE S. HUFFMAN and EDWARD L. FAIR

PROOF OF SERVICE

I hereby certify that a copy of the foregoing Motions to Dissolve Temporary Restraining Order and to Dismiss was mailed to regular U. S. Mail this ____ day of February, 1973, to attorney for Plaintiff, Gilbert H. Deitch, Suite 2005, One Hundred Colony Square, 1175 Peachtree Street, N.E., Atlanta, Georgia, 30309.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

| | | |
|---|---|---|
| PURSUE, LTD., | : | |
| Plaintiff | : | CASE NO. C 72-432 |
| -vs- | : | |
| Lawrence S. Huffman et al | : | MOTION FOR IMMEDIATE HEARING ON MOTIONS TO DISSOLVE TEMPORARY RESTRAINING ORDER AND TO DISMISS. |
| Defendants | : | |
| | : | |
| | : | |

.. .. .. .

MEMORANDUM

This motion is being filed pursuant to Rule 6(d) of the Federal Rules of Civil Procedure, which provides, in material part, as follows:

> "A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than five days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order for cause shown shall be made on ex parte application . . . ."

On November 30, 1972, after two prior adversary hearings the Allen County Court of Common Pleas issued a permanent injunction and, having made a finding that a nuisance existed at the premises located at #69 Public Square, Lima, Ohio, ordered said premises closed as required by the pertinent Ohio statutes.

On December 1, 1972, plaintiff filed his complaint herein and obtained without notice an ex parte a temporary restraining order. Plaintiff's suit was predicated upon a contention that enforcement of the state court's order effectively curtailed plaintiff's First Amendment rights, and that by reason thereof, plaintiff sustained great and immediate irreparable injury.

Defendants represent to this Court that plaintiff has used the Court to its own ends and has falsely and fraudulently filed its Complaint, obtained a temporary restraining order, and filed a petition for removal for the sole purpose of commercially exploiting the dominant sexual theme of motion pictures exhibited by plaintiff in the subject premises, to the great and immediate irreparable harm to the citizens of the State of Ohio in whose name defendant Huffman brought the State action.

In support of defendants' allegations, defendants have attached to and incorporated by reference Exhibits A, B, and C to their motions to dissolve temporary restraining order and to dismiss which are affidavits of persons who have seen the motion pictures exhibited by plaintiff at the subject premises for three successive weeks, January 10-30, 1973, together with

photographic reductions of time-motion studies of said motion picture films. Tape recordings have been made of said films and will be available at the hearing of defendants' Motions to Dissolve Temporary Restraining Order and to Dismiss. (A copy of the said time-motion studies are not attached to copies of said motions served upon counsel for plaintiff as only one copy is presently available; said time-motion studies are available to plaintiff's counsel in the Clerk's Office, having been previously filed herein).

Plaintiff's continuous exhibition of obscene motion picture films and abuse of the federal judicial process to perpetuate a fraud upon this Court is flagrant and without precedent. Unfortunately, this Court has been placed in a position of making an order based upon a contention of great and immediate irreparable injury by plaintiff which has, as the attached exhibits demonstrate, resulted in great and immediate irreparable harm to the citizens of the State of Ohio, not the plaintiff.

To permit plaintiff to persist in such conduct is to reward an entity commercially exploiting sex under the pretense of freedom of expression and, at the same time, punish the people of the State of Ohio by thwarting good faith State prosecution under the Ohio nuisance statutes brought on behalf of the people of the State of Ohio.

Defendants submit that plaintiff's complaint and the subsequent petition for removal filed in this Court are really nothing more than a sham tactic designed to delay and, hopefully, destroy defendants' efforts to abate the nuisance at the Cinema I Theatre, #69 Public Square, Lima, Ohio, said location having been previously adjudicated a nuisance after prior adversary proceedings and continuing to be a nuisance by virtue of the sham actions brought by plaintiff in this Court.

Defendants further submit that time is of the essence as plaintiff persists in exhibiting obscene motion pictures at the subject premises; and that unless this Court orders an immediate hearing on defendants'

motions to dissolve temporary restraining order and to dismiss, defendants' rights to proceed in the State Court and insure abatement of the subject premises as a public nuisance will be substantially prejudiced and a great injustice will thereby result.

Respectfully submitted,

Lawrence S. Huffman
Prosecuting Attorney
Allen County, Ohio

Gary R. Hermon
Assistant Prosecuting Attorney
Allen County, Ohio

PROOF OF SERVICE

I hereby certify that a copy of the foregoing Motion was mailed by regular U. S. Mail this _____ day of February, 1973, to attorney for plaintiff herein, Gilbert H. Deitch, Suite 2005, One Hundred Colony Square, 1175 Peachtree Street, Atlanta, Georgia, 30309.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

| | | |
|---|---|---|
| STATE OF OHIO ex rel LAWRENCE S. HUFFMAN | : | |
| Respondent | : | CASE NO. C 72-445 |
| -vs- | : | |
| WILLIAM H. DAKOTA et al | : | MOTION FOR IMMEDIATE HEARING ON MOTION TO REMAND. |
| Petitioners | : | |

.. .. .. .

Rules of Civil Procedure which provides in material part as follows:

> "A written motion other than one which may be heard ex parte and notice of the hearing thereof shall be served not later than five (5) days before the time specified for the hearing unless a different period is fixed by these rules or by Order of the Court. Such an order for cause shown shall be made on ex parte application . . . ."

In September, 1972, respondent filed a complaint in equity in the Court of Common Pleas of Allen County, Ohio, seeking to enjoin the continuous exhibition of obscene motion picture films and to abate the same as a public nuisance in Allen County and in the State of Ohio. The Complaint was filed pursuant to Sections 3767.01 et seq., of the Ohio Revised Code. Respondent further applied for a preliminary injunction which application was heard by the Court of Common Pleas and after due deliberation, the Court did grant a preliminary injunction on October 24, 1972.

On November 30, 1972, the Common Pleas Court of Allen County, Ohio, issued a permanent injunction finding that a nuisance existed at #69 Public Square, Lima, Ohio, and permanently enjoined the exhibition of obscene motion picture films at said location.

On December 1, 1972, this Court issued a temporary restraining order in effect modifying the Common Pleas Court Order and requiring the State Court to hold a prior adversary hearing on obscenity prior to effectively restraining the exhibition of such film. On December 4, the Respondent filed a motion for such a prior adversary hearing and shortly thereafter filed a similar motion which was shceduled for hearing in the State Court for December 12, 1972. On December 11, 1972, the day prior to the State Court hearing which had been scheduled in compliance with the Federal Court Order petitioners filed their petition for removal herein. Respondent submits that the petition for removal is really nothing more than a sham tactic designed to delay respondent's efforts to abate the nuisance in the State Court utilizing those procedures outlined by the Federal Court in a previous temporary restraining order.

In support of respondent's allegations, respondent refers to Exhibits A, B, and C attached to respondent's motions to dissolve temporary restraining order and to dismiss in Case No. C 72-432 in this Court which are hereby incorporated by reference. Said exhibits are affidavits of persons who have seen the motion pictures exhibited at the subject premises for three successive weeks, January 10-30, 1973, together with photographic reductions of time-motion studies of said motion picture films. Tape recordings have been made of said films and will be available at the hearing of respondent's Motion to Remand.

The continuous exhibition of obscene motion picture films as evidenced by the aforementioned exhibits and petitioner's abuse of the federal judicial process to perpetuate a fraud upon this Court is flagrant and without precedent. Unfortunately, this Court has been used by petitioners, perhaps unwillingly, but by operation of the applicable federal statutes to effectively terminate the jurisdiction of the State Court thereby permitting the continuous commercial exploitation of sex at the subject premises under the pretense of freedom of expression. It would seem that the Court would welcome the opportunity to undo that which the operation of certain removal statutes dictate as the initial effect of filing a petition for removal, namely termination of State Court jurisdiction.

Respondent further submits that this matter was awaiting a prior adversary hearing on the obscenity of motion picture films being exhibited at #69 Public Square, Lima, Ohio, time is of the essence and the matter is pressing. Unless this Court orders an immediate hearing on Respondent's Motion to Remand, respondent's rights to have the motion picture films being exhibited at #69 Public Square, Lima, Ohio, declared obscene and abated as a public nuisance will be substantially prejudiced and a great injustice will result.

Respectfully submitted,

Lawrence S. Huffman, Prosecuting Attorney
Allen County, Ohio

Gary R. Hermon, Assistant Prosecuting Attorney, Allen County, Ohio
ATTORNEYS FOR RESPONDENT

PROOF OF SERVICE

I hereby certify that a copy of the foregoing Motion for Immediate Hearing on Motion to Remand was mailed to attorney for Petitioners, Gilbert H. Deitch, Suite 2005, One Hundred Colony Square, 1175 Peachtree Street, Atlanta, Georgia, 30309, this _____ day of February, 1973, by regular U. S. Mail.

_____

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

| | |
|---|---|
| THE STATE OF OHIO ex rel<br>RESPONDENT<br>-vs-<br>WILLIAM H. DAKOTA et al<br>PETITIONERS | CASE NO. C72-445<br><br>ADDITIONAL MEMORANDUM IN SUPPORT OF MOTION TO REMAND. |

This Federal District Court lacks subject matter jurisdiction as this action is not a civil rights case within 28 U.S.C. Section 1443.

In their petition, William H. Dakota, et al, hereinafter referred to as defendants, have alleged that this United States District Court has jurisdiction over the case at hand. The defendants contend that this is a type of civil action of which the district courts of the United States have original jurisdiction under 28 U.S.C., Section 1443 (Civil Rights) and which may be removed to a federal district court pursuant to 28 U.S.C., Section 1441 (b).

With regard to the defendants' contention that 28 U.S.C., Section 1443 gives this Federal District Court jurisdiction, it is respectfully submitted that the well reasoned opinion and decision in State of Ohio, ex rel Robert J. Anderson v. A Motion Picture Film Entitled "Together" et al, in Case #C72-28 in this United States District Court for the Northern District of Ohio, Western Division is dispositive of such contention. A copy of said opinion and order is attached hereto, marked Exhibit A and incorporated herein by reference.

Defendants allege that plaintiff, State of Ohio, ex rel Lawrence S. Huffman, has conspired to intimidate and harass the defendants from exhibiting such films as the local exhibitors choose. They contend that in furtherance of this conspiracy plaintiff has instituted numerous actions similar to the instant case under authority of a state statutory scheme allowing individuals to act in the place of the state attorney general or prosecutor in enforcing the public nuisance laws. Because the film owners or exhibitors first amendment rights to free speech were not found to prevail in any of the cases prior to removal to this Federal District Court, defendants argue that they cannot enforce their first amendment rights as citizens of the United States to freedom of speech and of the press in the Court of Common Pleas of Allen County, Ohio, and that, therefore, they are entitled to call upon the jurisdiction of this federal court for a final adjudication of the matter, pursuant to 28 U.S.C. Section 1443.

As the following analysis will show, this Federal Court lacks jurisdiction over the subject matter because this action is not a civil rights case within the meaning of 28 U.S.C. 1443, and removal of such case was therefore not proper.

In providing for the removal of certain civil rights cases, Section 1443 reads as follows:

> "Any of the following civil acts or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and diversion embracing the place wherein it is pending:
>
> "1. Against any person who is denied or cannot enforce in the courts of such state a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;
>
> "2. For any act under color of authority derived from any law providing for equal rights, or for refusing

to do any act on the ground that it would be inconsistent with such law." (Emphasis added)

A simple reading of this section reveals that the Court of Appeals for the Fourth Circuit was correct in describing the language of this section as "exquisite obscurity." See Baines v. Denville, 357 F. 2d 756 (4th Circ., 1966).

The scope of the civil rights removal statute, 28 U.S.C. Section 1443, was considered and construed by the United States Supreme Court in Georgia v. Rachel, 384 U.S. 780 (1966) and its companion case of Greenwood v. Peacock, 384 U.S. 808 (1966).

On review, the Supreme Court in Rachel construed Section 1443 (1) as requiring a showing of two elements to permit removal:

1. that the right . . . is a right under any law providing for . . . equal civil rights, and

2. that petitioner is denied or cannot enforce that right in the state courts.

The court also said that the first element must be construed to mean any law providing for specific civil rights stated in terms of racial equality. See Lvanston v. Buick, 421 F. 2d 595 (7th Circ., 1970).

In writing for a majority of the Supreme Court in Rachel, Mr. Justice Stewart said, at pages 791-792:

". . . we conclude, therefore, that the model for the phrase 'any law providing for . . . equal civil rights' in Section 641 was the Civil Rights Act of 1866.

"The legislative history of the 1866 Act clearly indicates that Congress intended to protect a limited category of rights, specifically defined in terms of racial equality . . .

"On the basis of the historical material that is available, we conclude that the phrase 'any law providing for . . . equal civil rights' must be construed to mean any law providing for specific civil rights stated in terms of racial equality. Thus, the defendants' broad contentions under the

> First Amendment and the Due Process Clause of the Fourteenth Amendment cannot support a valid claim for removal under Section 1443, because the guarantees of those clauses are phrased in terms of general application available to all persons or citizens, rather than in the specific language of racial equality that Section 1443 demands. As the Court of Appeals for the Second Circuit has concluded, Section 1443 'applies only to rights that are granted in terms of equality and not to the whole gamut of constitutional rights . . .' 'When the removal statute speaks of "any law providing for equal rights," it refers to those laws that are couched in terms of equality, such as the historic and the recent equal rights statutes, as distinguished from laws, of which the due process clause and 42 U.S.C. Section 1983 are sufficient examples, that confer equal rights in the sense, vital to our way of life, of bestowing them upon all."(citation omitted). Emphasis added).

Thus, the test for removal pursuant to 28 U.S.C. Section 1443 (1) under Rachel is whether a petitioner is denied or cannot enforce in a state court a right given by a federal statute providing for a specific civil right in terms of racial equality.

In the companion case of Greenwood v. Peacock, 384 U.S. 808 (1966), the Supreme Court held that Section 1443 (1) operated only where a state law rendered it impossible for defendants to enforce their civil rights in State courts or where the mere prosecution violated a federal equal rights law, and that Section 1443 (2) confers the privilege of removal only on federal officers or agents and those authorized to act with or for them in affirmatively executing duties under federal law providing for equal civil rights. In all other cases the state courts should have a chance to enforce the defendants' rights, no matter how their rights had been denied by State administrative officials in advance of the trial.

In addition, the Supreme Court in Peacock specifically held that "the First Amendment rights of free expression . . . so heavily relied upon in the removal petitions, are not rights arising under a law providing for 'equal civil rights' within

the meaning of Section 1443(1), and that the reference in Section 1443(1) . . . to 'equal civil rights' . . . does not include the broad constitutional guarantees of the First Amendment."

From Peacock it is obvious that defendants are not within the purview of Section 1443(2), and this subsection will therefore be disregarded for further purposes of this brief.

The net result of the Georgia v. Rachel, Greenwood v. Peacock dialogue is to establish, as a prerequisite to removal of a pending civil action or criminal prosecution under 28 U.S.C. Section 1443(1), the necessity of showing that a defendant is being denied or cannot enforce rights guaranteed under a federal law "providing for specific civil rights stated in terms of racial equality." As stated in the case of South Carolina v. Moore, 447 F. 2d 1067, 1070 (4th Cir. 1971):

> "The defendant must show that there is a basis for a firm prediction that such rights will be denied in the State court or that the pendency of the prosecution without more, is a deprivation of such a federally protected right . . . he must show that his federally secured right of racial equality is denied by the pendency of the proceeding or by reason of the operation of a pervasive and explicit state or federal law that those rights will inevitably be denied by the very act of bringing the defendant to trial in the state court."

Applying the reasoning of Rachel and Peacock to the present case, it is obvious that this action is not a civil rights case within 28 U.S.C. Section 1443(1). The sole ground cited by the defendants in their petition for removal of this case pursuant to 28 U.S.C. Section 1443(1) was that they cannot enforce in the Court of Common Pleas of Allen County, Ohio, their first amendment rights as citizens of the United States to freedom of speech. However, as the Rachel and Peacock decisions make clear, defendants' broad contention that they cannot enforce their first amendment rights to freedom of speech in the State court

cannot support a valid claim for removal and jurisdiction under Section 1443(1), because the guarantees of the First Amendment are phrased in terms of general application available to all persons or citizens, rather than in the specific language of racial equality that Section 1443(1) demands.

As stated, the only ground relied upon by defendants in their petition for removal of this case pursuant to 28 U.S.C. Section 1443(1) is that they cannot enforce their first amendment rights to freedom of speech in the state courts. Because their petition for removal failed to make any showing whatever that they are being denied or cannot enforce rights guaranteed under a federal law providing for specific equal civil rights stated in terms of racial equality, it is clear that under the holdings of the Rachel and Peacock cases defendants are not entitled to removal of this case pursuant to 28 U.S.C., Section 1443(1).

Finally, this court's well reasoned opinion (attached hereto and incorporated herein by reference) in State of Ohio ex rel Robert J. Anderson v. A Motion Picture Film Entitled "Together" et al in Case No. C72-28, is conclusively dispositive of the defendant's contention. In that case, it was held that:

> "Since First Amendment rights of free expression are not rights arising under a law providing for equal civil rights within the meaning of Section 1443(1) . . . the petitioners cannot support a valid claim herein for removal under 1443 by alleging denial of First Amendment rights."

The law therefore having been repeatedly and authoritatively so hld, it is clear that the defendants' allegation of jurisdiction by means of 28 U.S.C. Section 1443(1) is totally and unequivocally without merit; and, because of the lack of subject matter jurisdiction, the cause should again be remanded to the state court.

An action to abate a public nuisance is not removable under 28 U.S.C. Section 1441.

Defendants also contend that 28 U.S.C. Section 1343 specifically creates the original jurisdiction of the federal district court, thus triggering the removal provisions of Section 1441(B), by stating in their petition for removal at paragraph 6(A) -- "The District Courts have jurisdiction under 28 U.S.C. Section 1343 to redress violations of the Civil Rights Act against Petitioners, to wit, a denial of their rights under the First, Fifth, and Fourteenth Amendments to the Constitution of the United States."

To paraphrase defendants' contention, they claim that enforcement of the Ohio Nuisance Statutes, Sections 3767.01 et seq., violates their constitutional right of free speech.

The State of Ohio respectfully submits that this Federal District Court lacks jurisdiction because the plaintiffs' action is one to abate a public nuisance; that it is the type of action as to which the Federal Court has neither original nor removal jurisdiction. See Grove Press, Inc., v. City of Philadelphia, 300 F. Supp. 281, at 292, and 28 U.S.C. Section 1441 (B):

> ". . . The City derives its authority to seek an injunction against this 'nuisance' not from federal law, but rather from sovereign power delegated to it by the Commonwealth of Pennsylvania for the purpose of permitting it to protect the health of its citizens. . ."

And in the Grove Press, Inc. case, the Court also stated at page 292 the following:

> "Although it is likely that the alleged obscenity of 'I Am Curious --Yellow' will be the critical issue in the state court proceeding, this court nevertheless cannot conclude that removal to the federal court of this type of case either is contemplated by Title 28 U.S.C., Section 1441 or supported by the policy considerations relevant to the removal problem.
>
> "The City's prayer for an injunction in the state

> courts neither constitutes a request . . . for a remedy expressly granted by an Act of Congress . . . nor does it necessarily require the construction of a Congressional Act or federal common law. The City derives its authority to seek an injunction against this "nuisance" not from federal law, but rather from sovereign power delegated to it . . . to protect the health and welfare of its citizens.
>
> "The Supreme Court has never indicated either that it is improper for states or municipalities to proscribe obscenity and prosecute those who sell and distribute obscene material, or that a state trial court or jury is unable to interpret and apply the appropriate constitutional standards. Significantly, the defendants have failed to cite any case removed solely on the basis that the defendants to the action planned to raise First Amendment defenses. Indeed, the only cited case which involves a factual situation similar to that involved here unequivocally holds that a plaintiff's anticipation of such defenses . . . would not mean that the cause of action alleged by plaintiff is founded on a claim or right arising under the Constitution . . . Levitt and Sons, Inc. v. Prince George County Cong. of Racial Eq., 221 F. Supp 541, 544 (D Md., 1963) . . .
>
> "Furthermore, the defendants have failed to draw any distinction between this case and thousands of other cases properly instituted and prosecuted in the state courts, where defendants intend to rely primarily upon federal constitutional defenses. Sustaining removal in Civil Action No. 69-934 would create a precedent for sustaining removal of all state cases where defendants arrested and charged with lesser misdemeanors planned to rely on Federal Constitutional defenses. State courts, of course, have the same obligation as federal courts to vindicate meritorious federal constitutional claims, and assuming that an allegation that they will not do so is relevant in support of any request for federal judicial intervention, of Dombroski, supra, it is not relevant for purposes of removing an action here pursuant to Title 28 U.S.C., Section 1441."

In the instant case, the defendants are unable to show that their First Amendment rights have not, are not, or would not be protected in the state courts. Secondly, their mere allegation of a violation of First Amendment rights does not create the requisite controversy arising under the United States Constitution to grant this court jurisdiction over the matter. And finally, Chapter 3767 of the Ohio Revised Code has been unequivocally declared constitutional by this Court in Grove Press, Inc., v. Flask,

325 F. Supp, 574 (1970) under standards and utilizing procedures outlined by this Court in Pursue, Ltd. v. Lawrence S. Huffman, Case No. C72-432.

On the aforementioned authorities the plaintiffs respectfully submit that removal of the case at hand was not only improper, but that there is still no federal jurisdiction pursuant to 28 U.S.C. Sections 1443 and 1441(B), and that the case should again be remanded to the state courts for its adjudication.

Respectfully submitted,

Lawrence S. Huffman
Prosecuting Attorney
Allen County, Ohio
127-129 North Pierce Street
P. O. Box 546, Lima, Ohio 45802
Telephone: (419) 229-0786
ATTORNEY FOR RESPONDENT

# Appendix P


| | Page |
|---|---|
| Affidavit of Fred Hawk. . . . . | 2-3 |
| Time Motion Study of Films "Documentary of A Madam" and "Hedonist Hypnotist" filed with Three Judge District Court on Feb. 12, 1973, with supporting affidavit of Deputy Sheriff Fred Hawk in support of motion to dismiss in *Pursue Ltd. v. Huffman et al.* C72-432. . . . . | 4-39 |

AFFIDAVIT

STATE OF OHIO
SS:
ALLEN COUNTY

FRED HAWK, being first duly sworn, says that he is a deputy sheriff of Allen County, Ohio; that on January 10, 1973, he paid $3.00 and was admitted to the Cinema I Theatre, #69 Public Square, Lima, Ohio, and that he viewed two motion pictures entitled "Documentary of a Madam" and "The Hedonist Hypnotist".

Affiant says that attached hereto and incorporated by reference is a time motion study of said motion pictures; that said photographs appear in the chronological order in which they were taken and as numbered; that said photographs reflect that which was depicted on the screen at the time in the program as depicted on said photographs; and that said photographs are true and accurate representations of that which affiant saw projected on the motinn picture screen at said location on said date.

Affiant says that he viewed a multitude of various sexual acts performed in said motion pictures and depicted upon said motion picture screen at said location on said date; and that the attached photographs depict accurately the said sexual acts viewed by affiant as follows:

| | | |
|---|---|---|
| 1. | at photograph 103 | fellatio |
| 2. | at photograph 105 | sexual intercourse |
| 3. | at photographs 113-114 | fellatio |
| 4. | at photographs 116-135 | sexual intercourse |
| 5. | at photographs 147-154 | fellatio |
| 6. | at photographs 157-184 | sexual intercourse, group sex, lesbianism |

| | | |
|---|---|---|
| 7. | at photographs 235-241 | fellatio, group sex |
| 8. | at photographs 250-282 | fellatio |
| 9. | at photographs 254-278 | cunnilingus |
| 10. | at photographs 280-289 | cunnilingus |
| 11. | at photographs 284-292 | sexual intercourse |
| 12. | at photographs 295-307 | sexual intercourse |
| 13. | at photographs 322-323 | sexual intercourse |
| 14. | at photographs 350-381 | masochism |
| 15. | at photographs 390-449 | sadism |
| 16. | at photographs 458-461 | cunnilingus |
| 17. | at photographs 465-472 | sexual intercourse |
| 18. | at photograph 475 | cunnilingus |
| 19 | at photographs 476-489 | sexual intercourse |
| 20. | at photographs 502-602 | lesbianism |
| 21. | at photographs 536-551 | cunnilingus |
| 22. | at photographs 571-578 | female masturbating another female with electric vibrator |
| 23. | at photographs 585-597 | female having "intercourse" with another female with dildo |
| 24. | at photographs 827-844 | sexual intercourse |
| 25. | at photographs 859-933 | lesbianism |
| 26. | at photographs 905-912 | cunnilingus |
| 27. | at photographs 926-932 | cunnilingus |
| 28. | at photographs 955-976 | female masturbation |
| 29. | at photographs 1084-1095 | sexual intercourse |
| 30. | at photographs 1107-1139 | lesbianism |
| 31. | at photographs 1134 | cunnilingus |
| 32. | at photographs 1154-1202 | group sex |

Further affiant saith not.

_____

Sworn to before me and subscribed in my presence this ___ day of February, 1973.

_____
Notary Public

TIME-MOTION STUDY OF FILMS "DOCUMENTARY OF A MADAM" AND "HEDONIST HYPNOTIST" - PART 1 of 18 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Deputy Sheriff Fred Hawk in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 10, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384.

"DOCUMENTARY OF A MADAM"

TIME-MOTION STUDY OF FILMS "DOCUMENTARY OF A MADAM" AND "HEDONIST HYPNOTIST" - PART 2 of 18 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Deputy Sheriff Fred Hawk in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 10, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384.

"DOCUMENTARY OF A MADAM" - Fellatio 103 - sexual intercourse 105 - fellatio 113, 114 - sexual intercourse 116 thrd 135

TIME-MOTION STUDY OF FILMS "DOCUMENTARY OF A MADAM" AND "HEDONIST HYPNOTIST" - PART 3 of 18 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Deputy Sheriff Fred Hawk in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 10, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384.

"DOCUMENTARY OF A MADAM " - Fellatio 147 thru 154 - sexual intercourse, group sex, lesbianism 157 thru 184

TIME-MOTION STUDY OF FILMS "DOCUMENTARY OF A MADAM" AND "HEDONIST HYPNOTIST" - PART 4 of 18 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Deputy Sheriff Fred Hawk in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 10, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384.

"DOCUMENTARY OF A MADAM" - Fellatio, group sex 235 thru 241 - fellatio 250 thru 282 - cunnilingus, fellatio, sexual intercourse 250 thru 288

TIME-MOTION STUDY OF FILMS "DOCUMENTARY OF A MADAM" AND "HEDONIST HYPNOTIST" - PART 5 of 18 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Deputy Sheriff Fred Hawk in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 10, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384.

"DOCUMENTARY OF A MADAM" - Sexual intercourse, cunnilingus 289 thru 323

TIME-MOTION STUDY OF FILMS "DOCUMENTARY OF A MADAM" AND "HEDONIST HYPNOTIST" - PART 6 of 18 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Deputy Sheriff Fred Hawk in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

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"DOCUMENTARY OF A MADAM"

TIME-MOTION STUDY OF FILMS "DOCUMENTARY OF A MADAM" AND "HEDONIST HYPNOTIST" - PART 7 of 18 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Deputy Sheriff Fred Hawk in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

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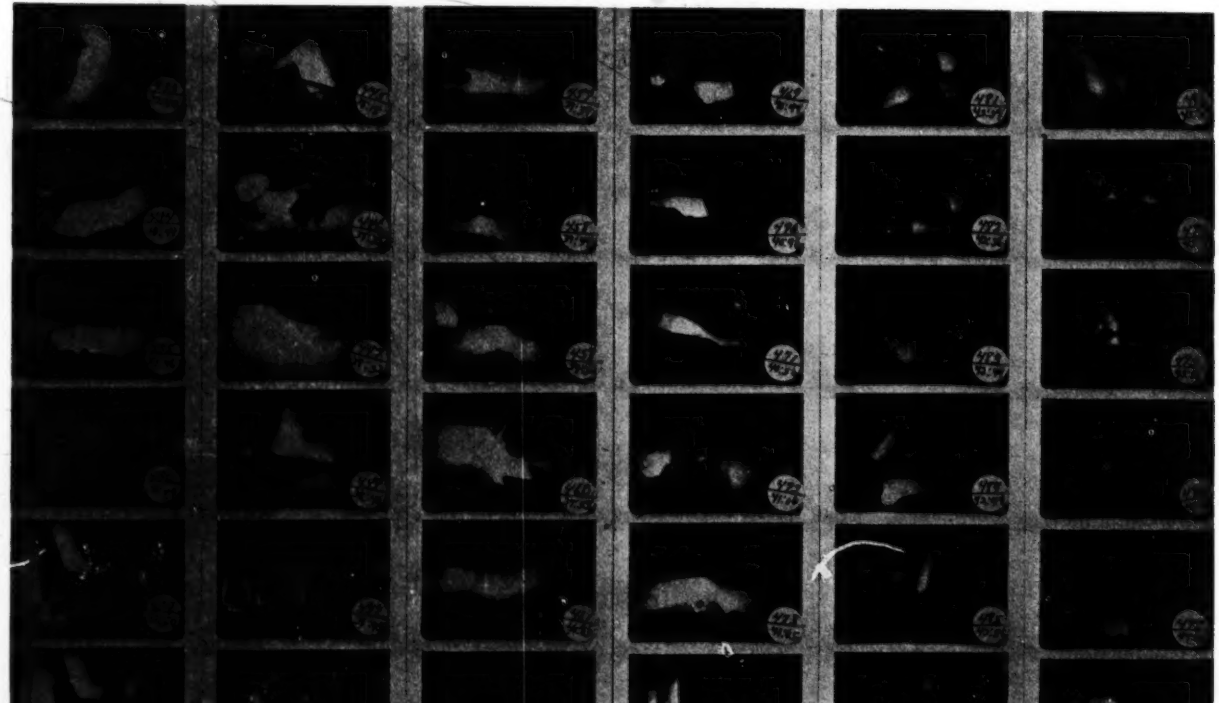

"DOCUMENTARY OF A MADAM" - Cunnilingus 458 thru 461 - sexual intercourse 465 thru 472 - cunnilingus 475 - sexual intercourse 476 thru 489 - lesbianism 502 thru 504

TIME-MOTION STUDY OF FILMS "DOCUMENTARY OF A MADAM" AND "HEDONIST HYPNOTIST" - PART 8 of 18 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Deputy Sheriff Fred Hawk in motion to dismiss Pursue Ltd. v. Huffman et al C72-432.'(See page 21)

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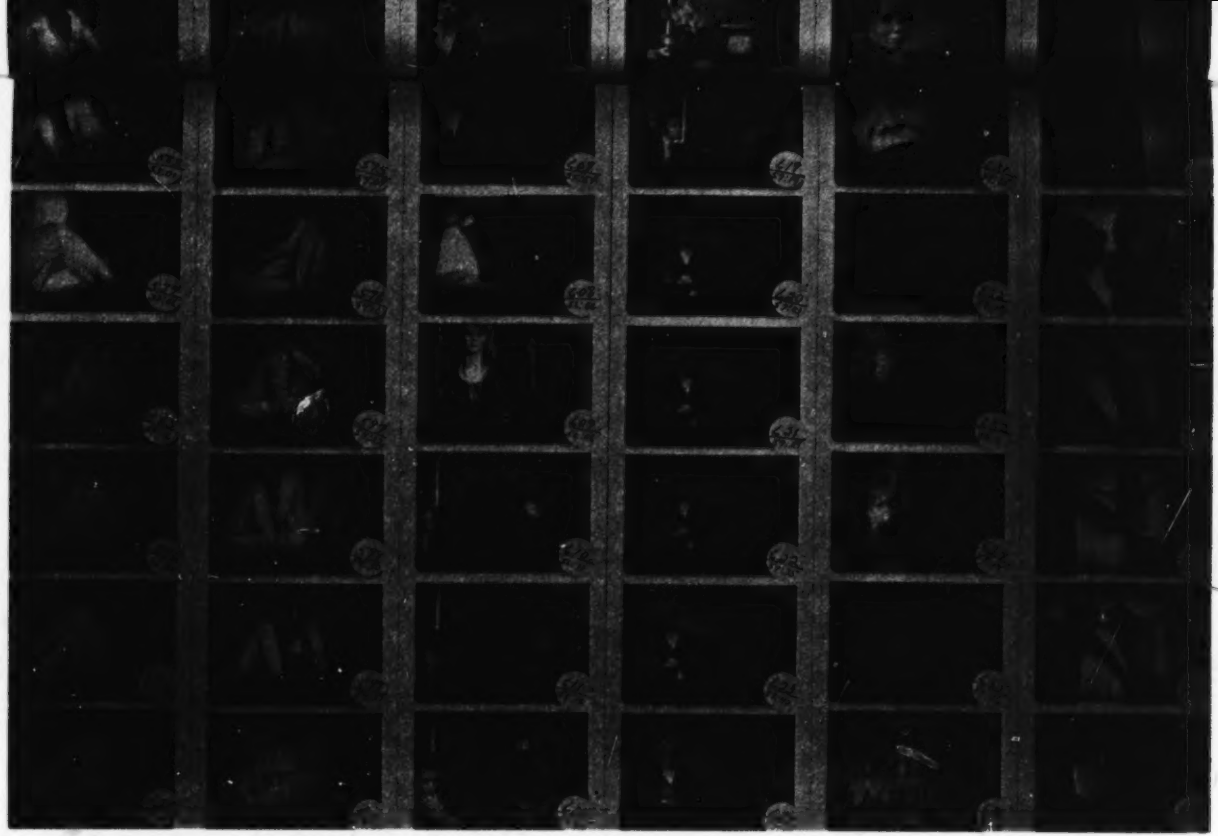
"DOCUMENTARY OF A MADAM" - Lesbianism, cunnilingus 505 thru 551 - female masturbating another with electric vibrator 571 thru 576

TIME-MOTION STUDY OF FILMS "DOCUMENTARY OF A MADAM" AND "HEDONIST HYPNOTIST" - PART 9 of 18 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Deputy Sheriff Fred Hawk in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 10, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384.





"DOCUMENTARY OF A MADAM" - Females performing sexual intercourse by use of dildo 585 thru 597 - Previews 636 thru 648

TIME-MOTION STUDY OF FILMS "DOCUMENTARY OF A MADAM" AND "HEDONIST HYPNOTIST" - PART 10 of 18 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Deputy Sheriff Fred Hawk in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 10, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384.

"HEDONIST HYPNOTIST" - Previews 649 thru 700 title appears The Hedonist Hypnotist 701 thru 705

TIME-MOTION STUDY OF FILMS "DOCUMENTARY OF A MADAM" AND "HEDONIST HYPNOTIST" - PART 11 of 18 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Deputy Sheriff Fred Hawk in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 10, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384.

"HEDONIST HYPNOTIST"

TIME-MOTION STUDY OF FILMS "DOCUMENTARY OF A MADAM" AND "HEDONIST HYPNOTIST" - PART 12 of 18 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Deputy Sheriff Fred Hawk in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

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"HEDONIST HYPNOTIST" - Sexual intercourse 827 thru 844 - lesbianism 859 thru 864

TIME-MOTION STUDY OF FILMS "DOCUMENTARY OF A MADAM" AND "HEDONIST HYPNOTIST" - PART 13 of 18 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Deputy Sheriff Fred Hawk in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

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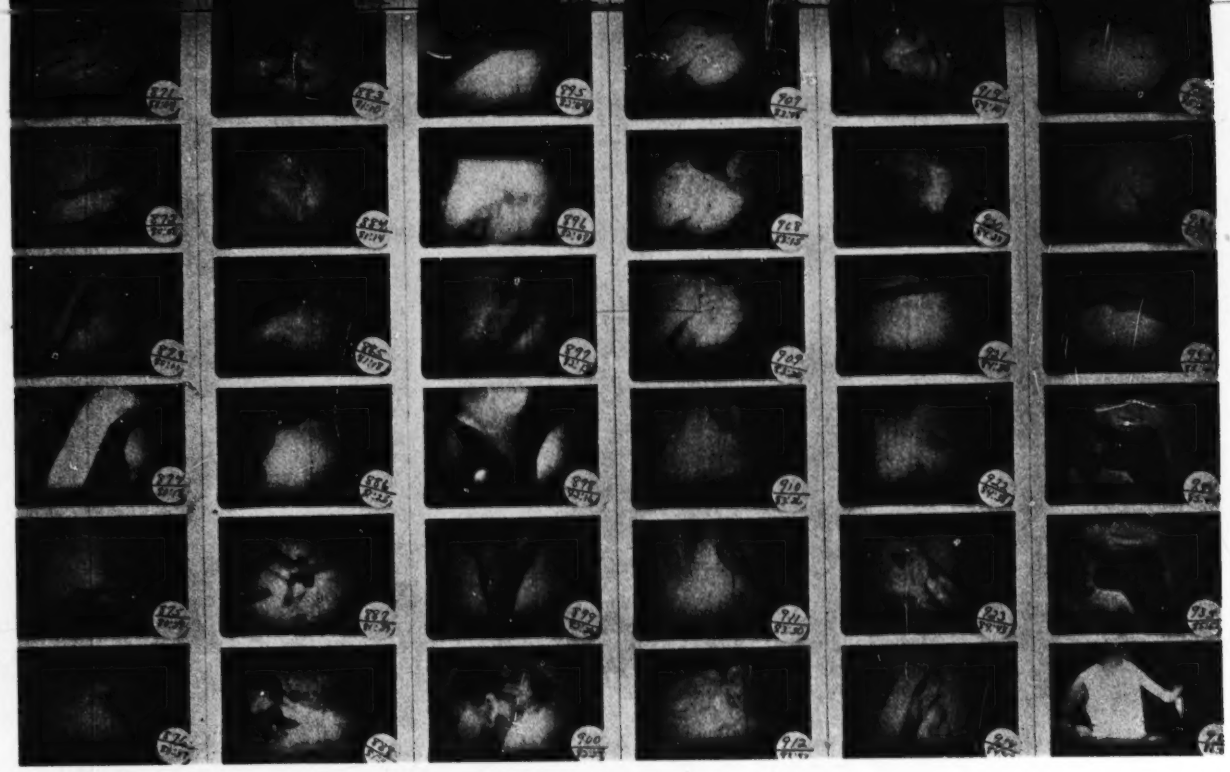


"HEDONIST HYPNOTIST" - Lesbianism, cunnilingus 865 thru 933

TIME-MOTION STUDY OF FILMS "DOCUMENTARY OF A MADAM" AND "HEDONIST HYPNOTIST" - PART 14 of 18 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Deputy Sheriff Fred Hawk in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

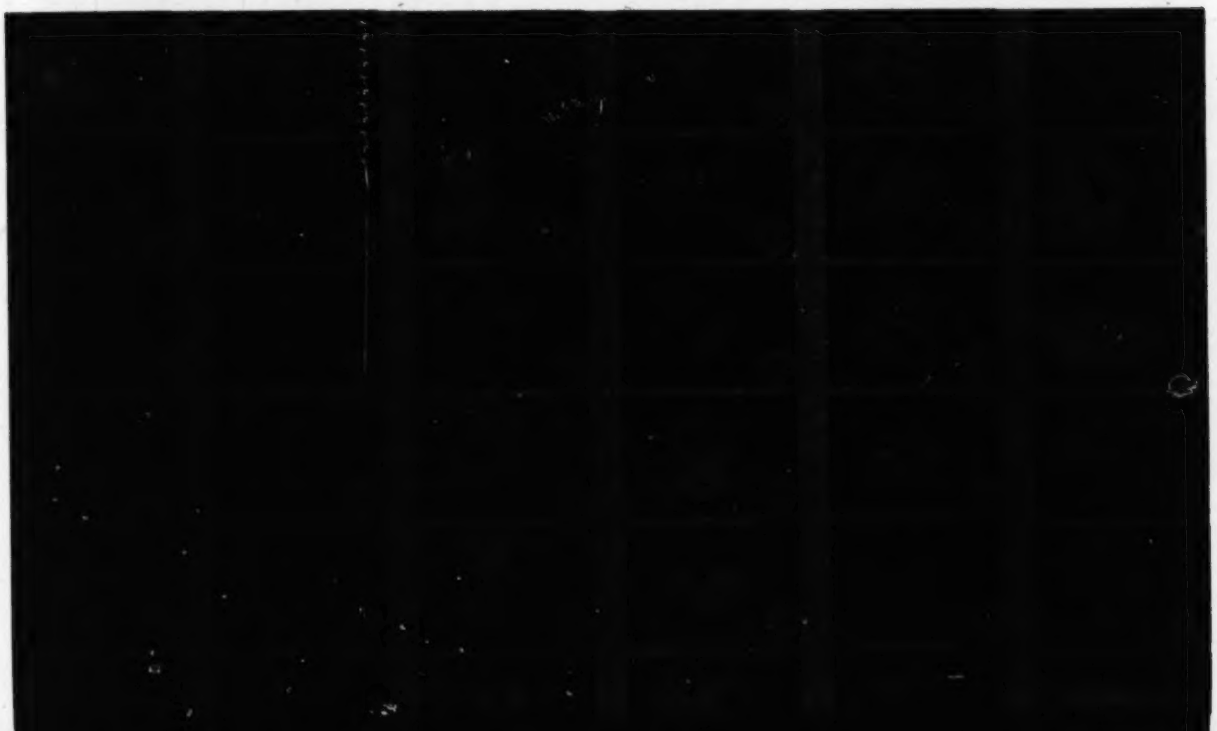
**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 10, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384.

"HEDONIST HYPNOTIST" - Female masturbates 955 thru 976

TIME-MOTION STUDY OF FILMS "DOCUMENTARY OF A MADAM" AND "HEDONIST HYPNOTIST" - PART 15 of 18 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Deputy Sheriff Fred Hawk in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 10, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384.



"HEDONIST HYPNOTIST"

TIME-MOTION STUDY OF FILMS "DOCUMENTARY OF A MADAM" AND "HEDONIST HYPNOTIST" - PART 16 of 18 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Deputy Sheriff Fred Hawk in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 10, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384.

"HEDONIST HYPNOTIST" - Sexual intercourse 1084 thru 1095 - lesbianism, cunnilingus 1107 thru 1139

TIME-MOTION STUDY OF FILMS "DOCUMENTARY OF A MADAM" AND "HEDONIST HYPNOTIST" - PART 17 of 18 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Deputy Sheriff Fred Hawk in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

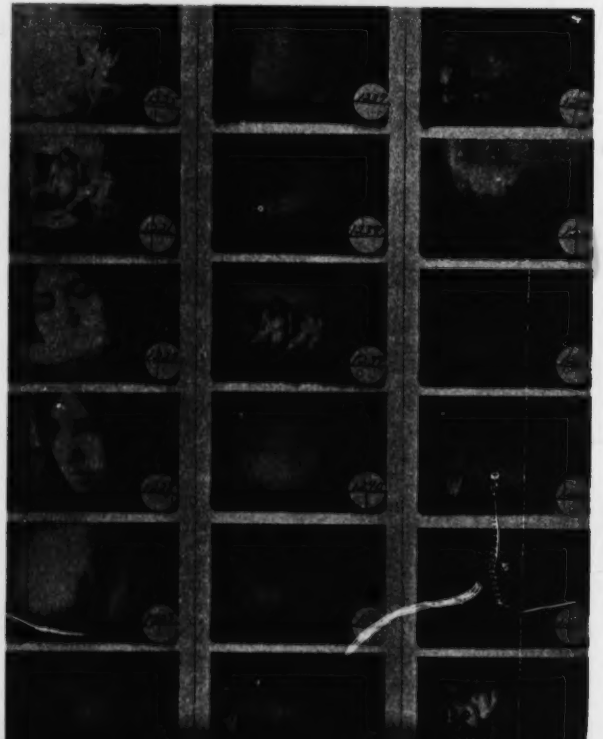
**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 10, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384.

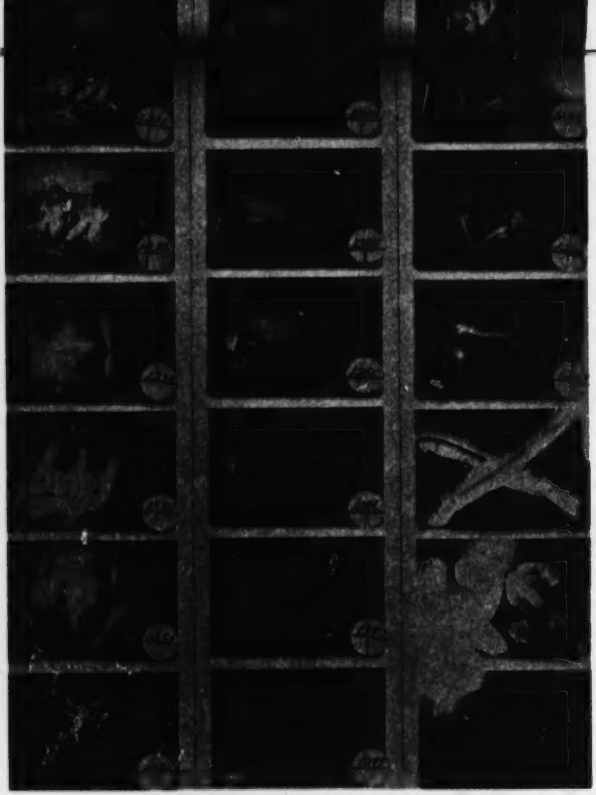
"HEDONIST HYPNOTIST" - Group sex 1154 thru 1202

TIME-MOTION STUDY OF FILMS "DOCUMENTARY OF A MADAM" AND "HEDONIST HYPNOTIST" - PART 18 of 18 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Deputy Sheriff Fred Hawk in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 10, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384.





"HEDONIST HYPNOTIST" - End 1240

# Appendix Q


| | Page |
|---|---|
| Affidavit of Larry Winegardner. . . . . | 2-3 |
| Time Motion Study of Films "The Chateau" and "Dirt Bike Bangers" filed with Three Judge District Court on Feb. 12, 1973, with supporting affidavit of Policeman Larry Winegardner in support of motion to dismiss in *Pursue Ltd. v. Huffman et al.* C72-432 . . . | 4-41 |

AFFIDAVIT

STATE OF OHIO
SS:
ALLEN COUNTY

LARRY WINEGARDNER, being first duly sworn, says that he is a policeman for the City of Lima, Ohio; that on January 23, 1973, he paid $3.00 and was admitted to the Cinema I Theatre, #69 Public Square, Lima, Ohio, and that he viewed two motion pictures entitled "The Chateau" and "Dirt-Bike Bangers".

Affiant says that attached hereto and incorporated by reference is a time motion study of said motion pictures; that said photographs appear in the chronological order in which they were taken and as numbered; that said photographs reflect that which was depicted on the screen at the time in the program as depicted on said photographs; and that said photographs are true and accurate representations of that which affiant saw projected on the motion picture screen at said location on said date.

Affiant says that he viewed a multitude of various sexual acts performed in said motion pictures and depicted upon said motion picture screen at said location on said date; and that the attached photographs depict accurately the said sexual acts viewed by affiant as follows:

1. At photographs 317-337 — fellatio
2. at photographs 338-340 — Sexual intercourse
3. at photographs 345-348 — sexual intercourse
4. at photographs 354-377 — anal sodomy
5. at photographs 635-641 — cunnilingus (female on female)
6. at photographs 717-720 — cunnilingus
7. at photographs 722-728 — sexual intercourse
8. at photographs 733-734 — sexual intercourse
9. at photographs 741-746 — sexual intercourse
10. at photographs 758-765 — fellatio

| | | |
|---|---|---|
| 11. | at photographs 771-775 | fellatio |
| 12. | at photographs 777-781 | fellatio |
| 13. | at photographs 796-808 | female masturbating herself |
| 14. | at photographs 817-820 | fellatio |
| 15. | at photographs 902-910 | sexual intercourse |
| 16. | at photographs 946-975 | lesbianism |
| 17. | at photographs 953-972 | cunnilingus (female on female) |
| 18. | at photographs 1029-1047 | sexual intercourse |
| 19. | at photographs 1098-1104 | sexual intercourse |
| 20. | at photographs 1112-1115 | sexual intercourse |
| 21. | at photographs 1273-1284 | sexual intercourse |

Further affiant saith not.

Harry A Wingardner

Sworn to before me and subscribed in my presence, this 7TH day of February, 1973.

Notary Public

MARY R. [illegible]
Notary Public, State of [illegible]
My Commission Exp[illegible]

**TIME-MOTION STUDY OF FILMS "CHATEAU" AND "DIRT BIKE BANGERS" - PART 1 of 19 PARTS**

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

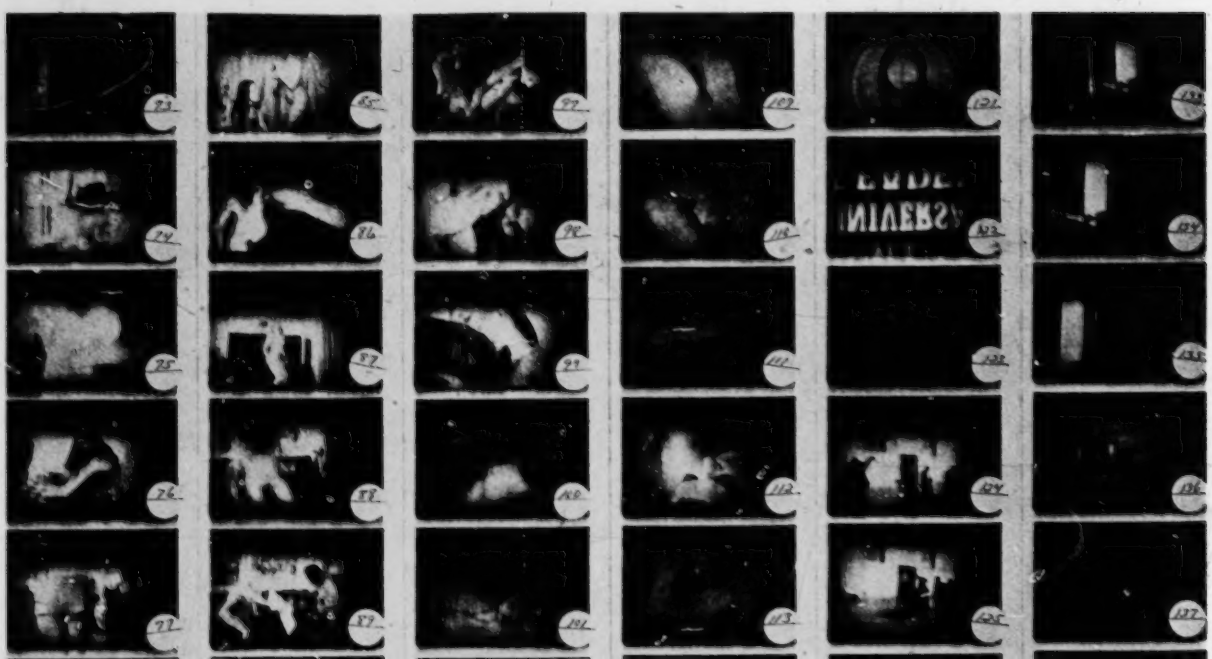
**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 23, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384.

"THE CHATEAU" - Previews 1-72

TIME-MOTION STUDY OF FILMS "CHATEAU" AND "DIRT BIKE BANGERS" - PART 2 of 19 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue ! td. v. Huffman et al C72-432. (See page 21).

**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 23, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384.

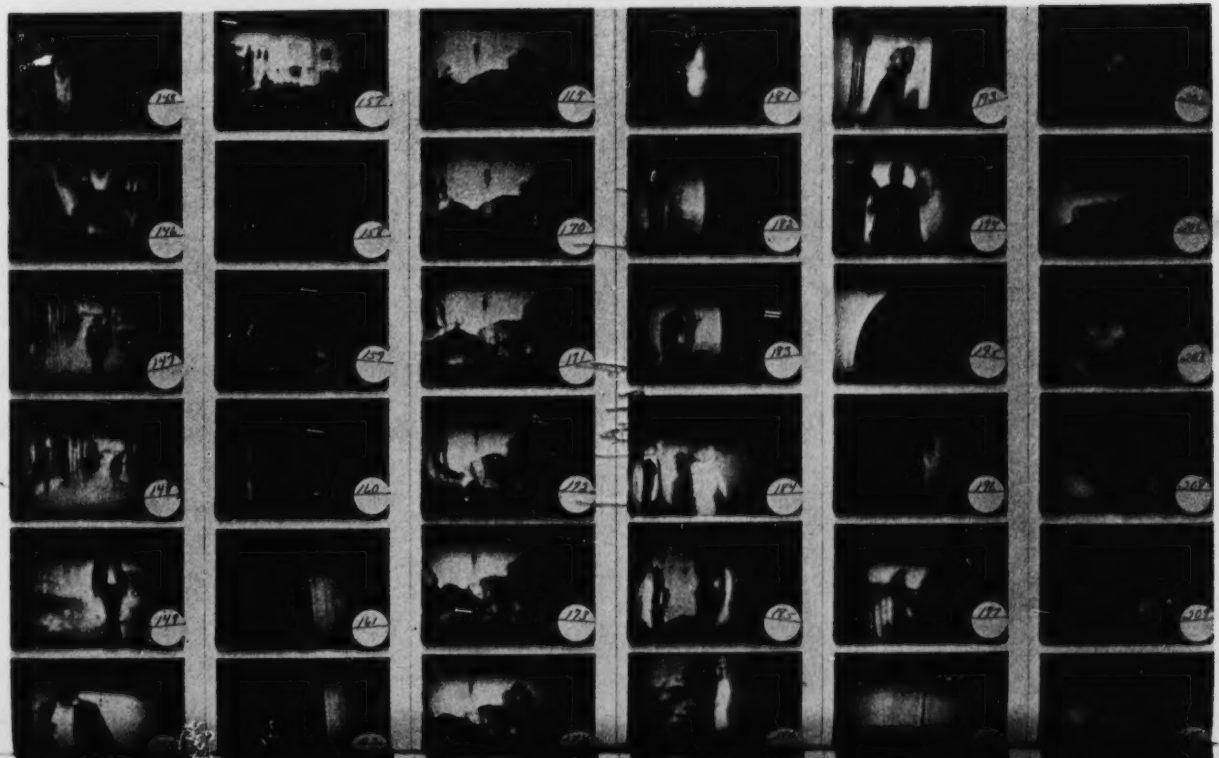


"THE CHATEAU" - Previews 73-120, Feature The Chateau starts 124

TIME-MOTION STUDY OF FILMS "CHATEAU" AND "DIRT BIKE BANGERS" - PART 3 of 19 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 23, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384.



"THE CHATEAU"

TIME-MOTION STUDY OF FILMS "CHATEAU" AND "DIRT BIKE BANGERS" - PART 4 of 19 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

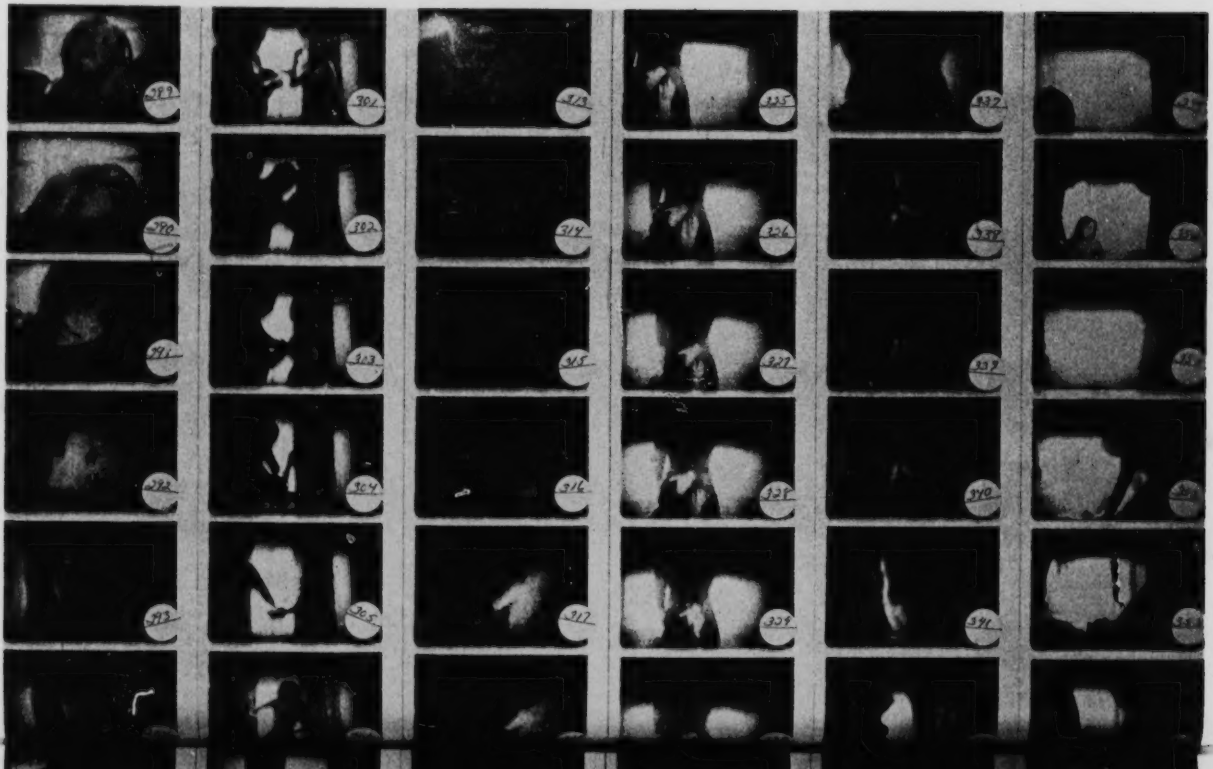
**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 23, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384.

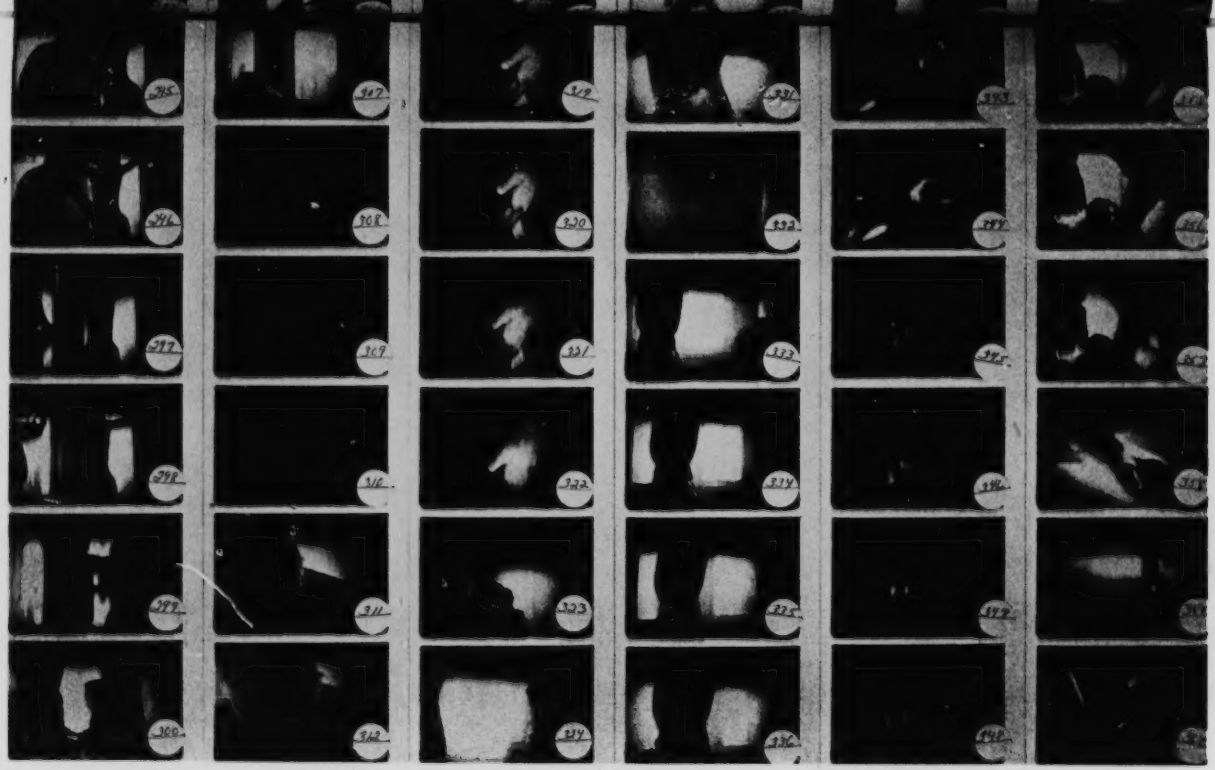
"THE CHATEAU"

TIME-MOTION STUDY OF FILMS "CHATEAU" AND "DIRT BIKE BANGERS" - PART 5 of 19 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 23, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384.





"THE CHATEAU" - Fellatio 317-337, sexual intercourse 338-340, 345-348, anal sodomy 354-360

TIME-MOTION STUDY OF FILMS "CHATEAU" AND "DIRT BIKE BANGERS" - PART 6 of 19 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 23, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384.

"THE CHATEAU" - Anal sodomy 361-377

TIME-MOTION STUDY OF FILMS "CHATEAU" AND "DIRT BIKE BANGERS" - PART 7 of 19 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 23, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384.

TIME-MOTION STUDY OF FILMS "CHATEAU" AND "DIRT BIKE BANGERS" - PART 8 of 19 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

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"THE CHATEAU"

TIME-MOTION STUDY OF FILMS "CHATEAU" AND "DIRT BIKE BANGERS" - PART 9 of 19 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

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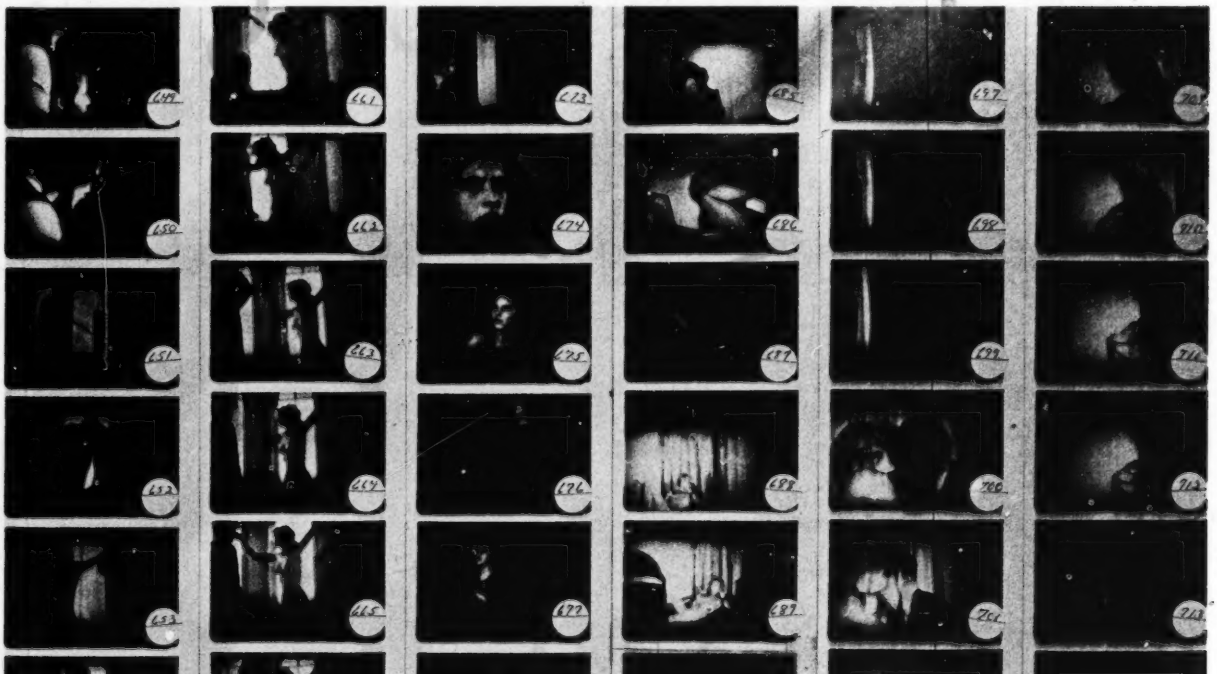
"THE CHATEAU" - Cunnilingus (female on female) 635-641

TIME-MOTION STUDY OF FILMS "CHATEAU" AND "DIRT BIKE BANGERS" - PART 10 of 19 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 23, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384.



"THE CHATEAU" - Cunnilingus 717-720

TIME-MOTION STUDY OF FILMS "CHATEAU" AND "DIRT BIKE BANGERS" - PART 11 of 19 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

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"THE CHATEAU" - Sexual intercourse 722-728, 733-734, 741-746, fellatio 758-765, 771-775, 777-781

TIME-MOTION STUDY OF FILMS "CHATEAU" AND "DIRT BIKE BANGERS" - PART 12 of 19 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

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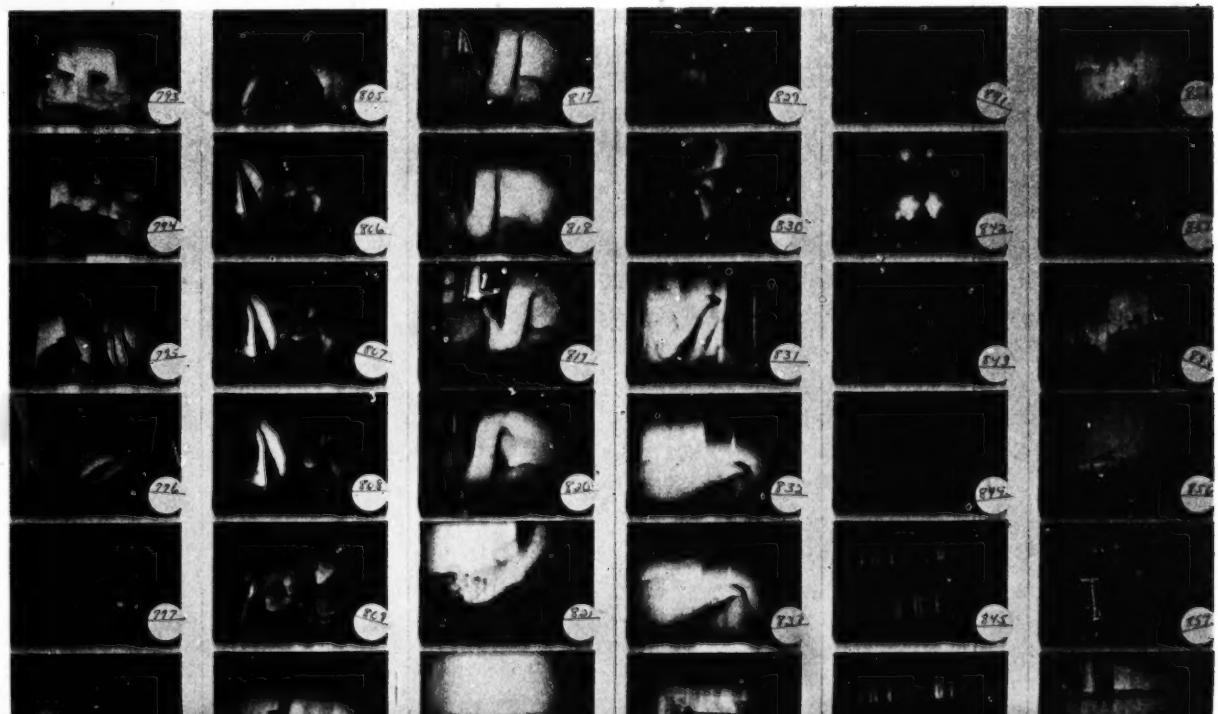

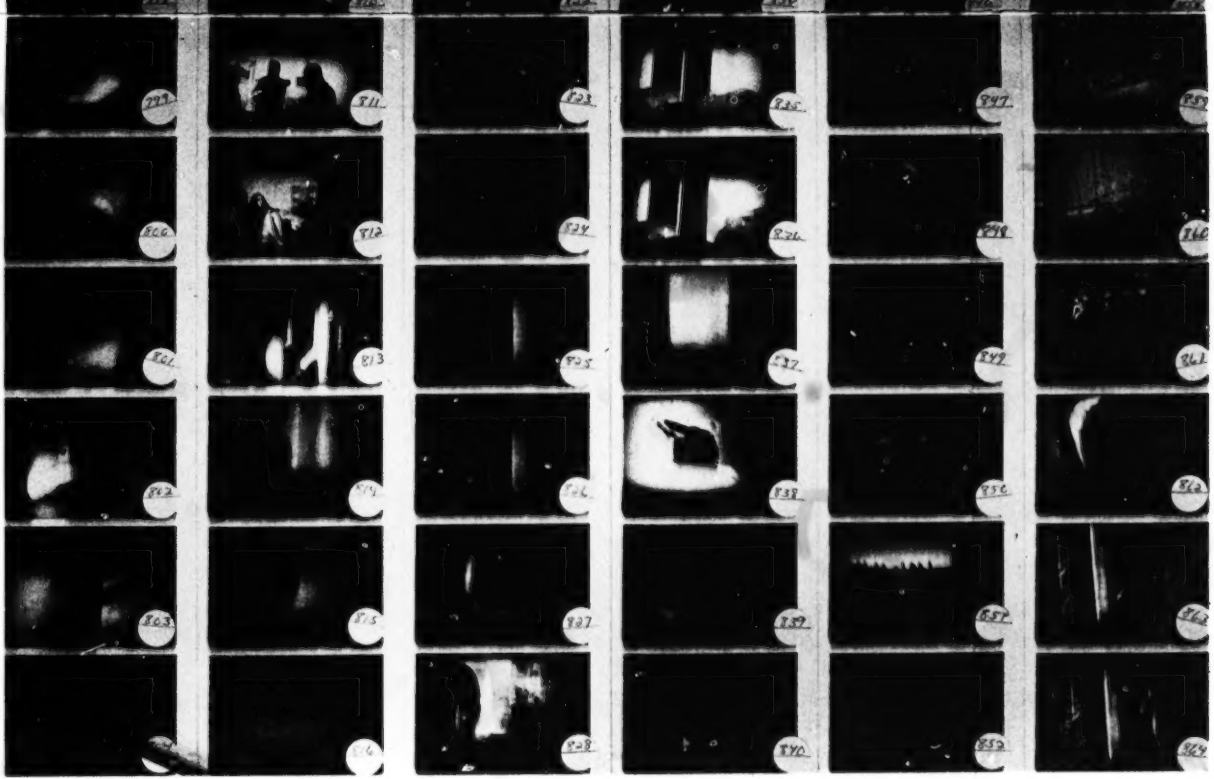

"THE CHATEAU" - Female masturbation 796-808, fellatio 817-820, End 844
"DIRT BIKE BANGERS" Title 845-846

TIME-MOTION STUDY OF FILMS "CHATEAU" AND "DIRT BIKE BANGERS" - PART 13 of 19 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 23, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384.

"DIRT BIKE BANGERS" - Sexual intercourse 902-910

TIME-MOTION STUDY OF FILMS "CHATEAU" AND "DIRT BIKE BANGERS" - PART 14 of 19 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

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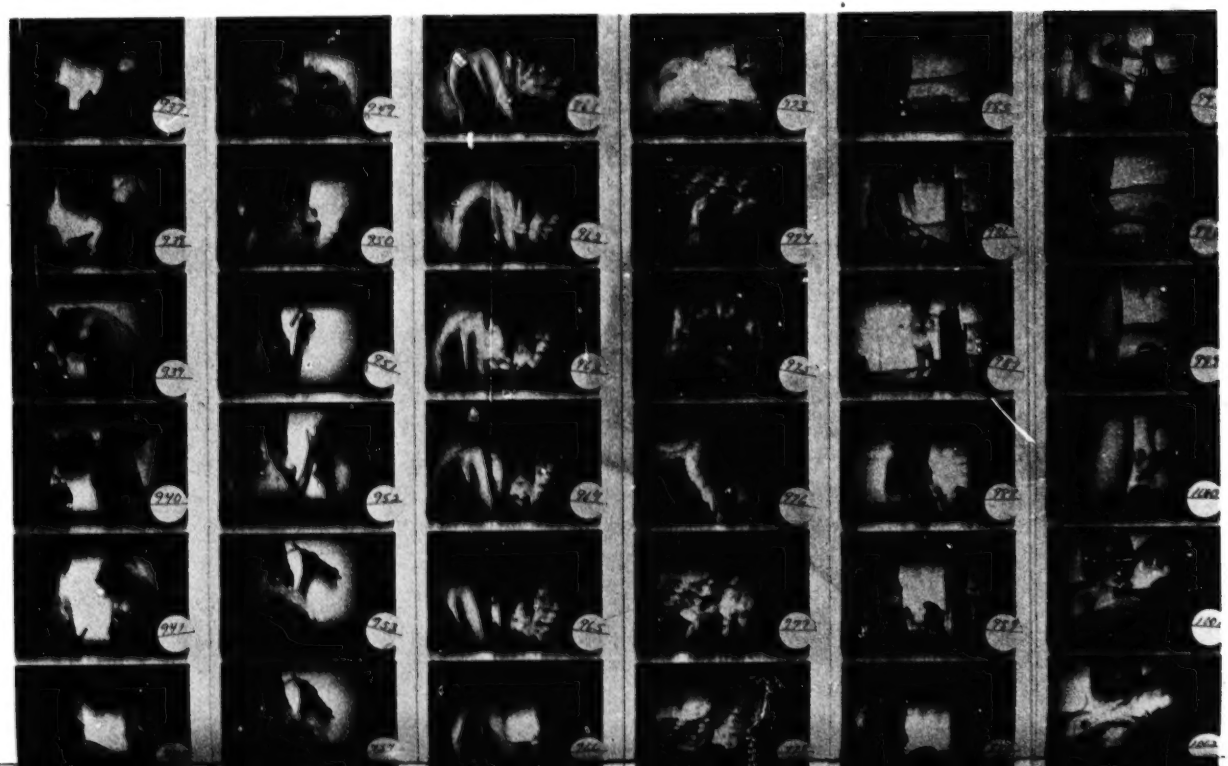

"DIRT BIKE BANGERS" - Lesbianism 946-948, cunnilingus (female on female) 953-972

TIME-MOTION STUDY OF FILMS "CHATEAU" AND "DIRT BIKE BANGERS" - PART 15 of 19 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 23, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384.

"DIRT BIKE BANGERS" - Sodomy 1029-1047

TIME-MOTION STUDY OF FILMS "CHATEAU" AND "DIRT BIKE BANGERS" - PART 16 of 19 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 23, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384.

"DIRT BIKE BANGERS" - Sexual intercourse 1098-1104, 1112-1115

TIME-MOTION STUDY OF FILMS "CHATEAU" AND "DIRT BIKE BANGERS" - PART 17 of 19 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

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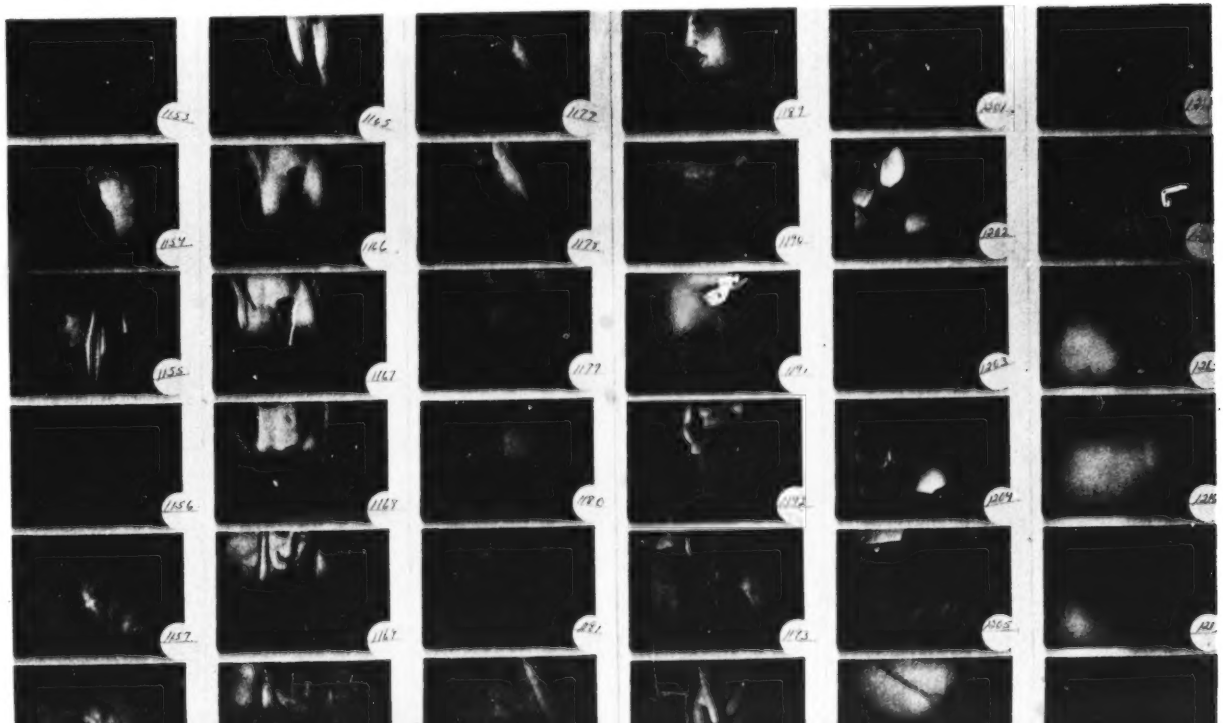
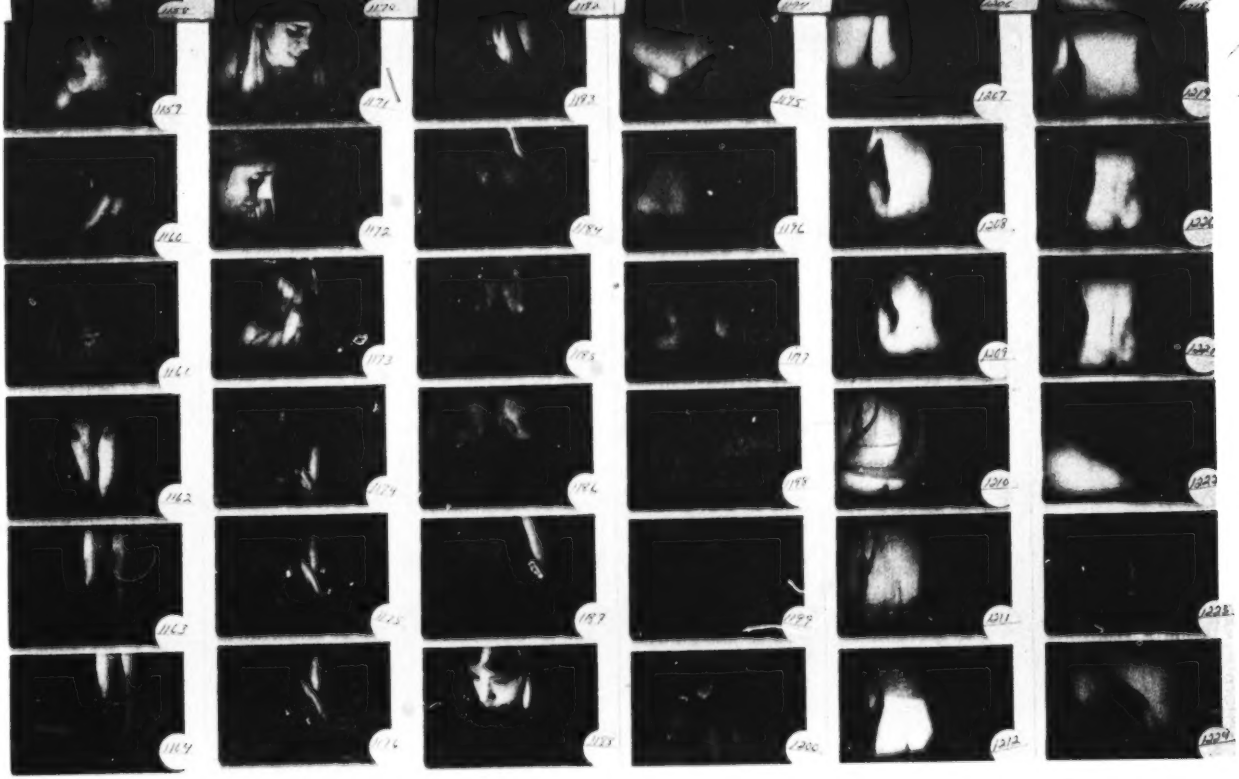


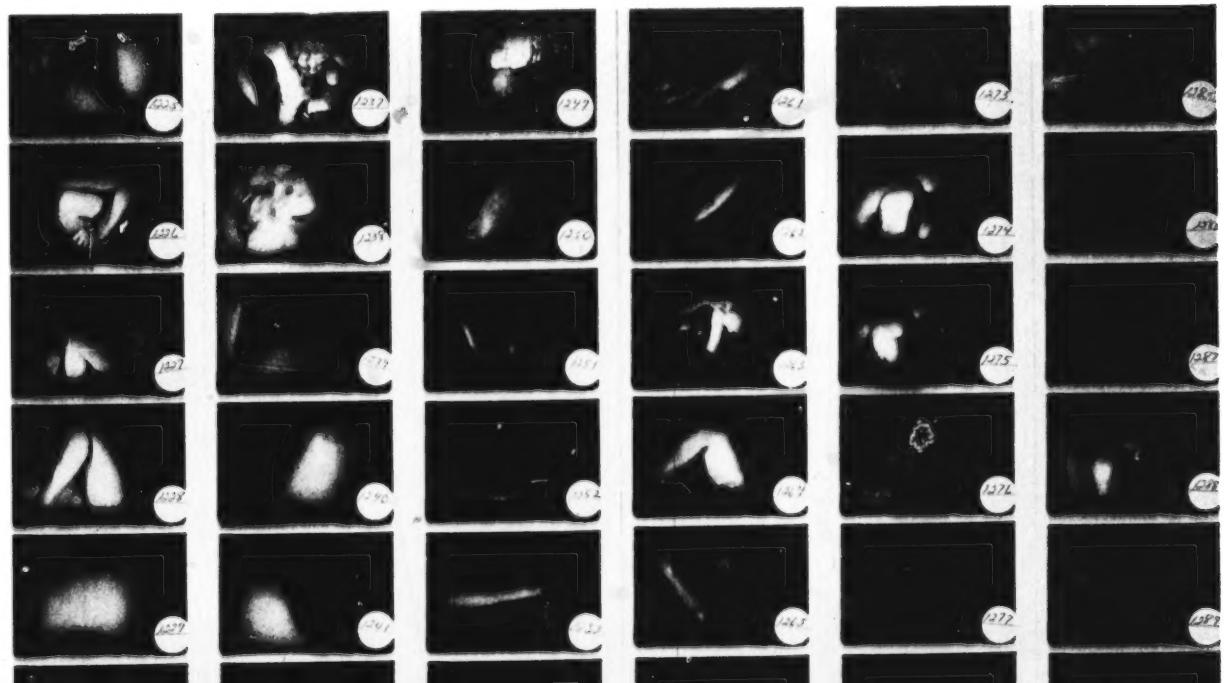


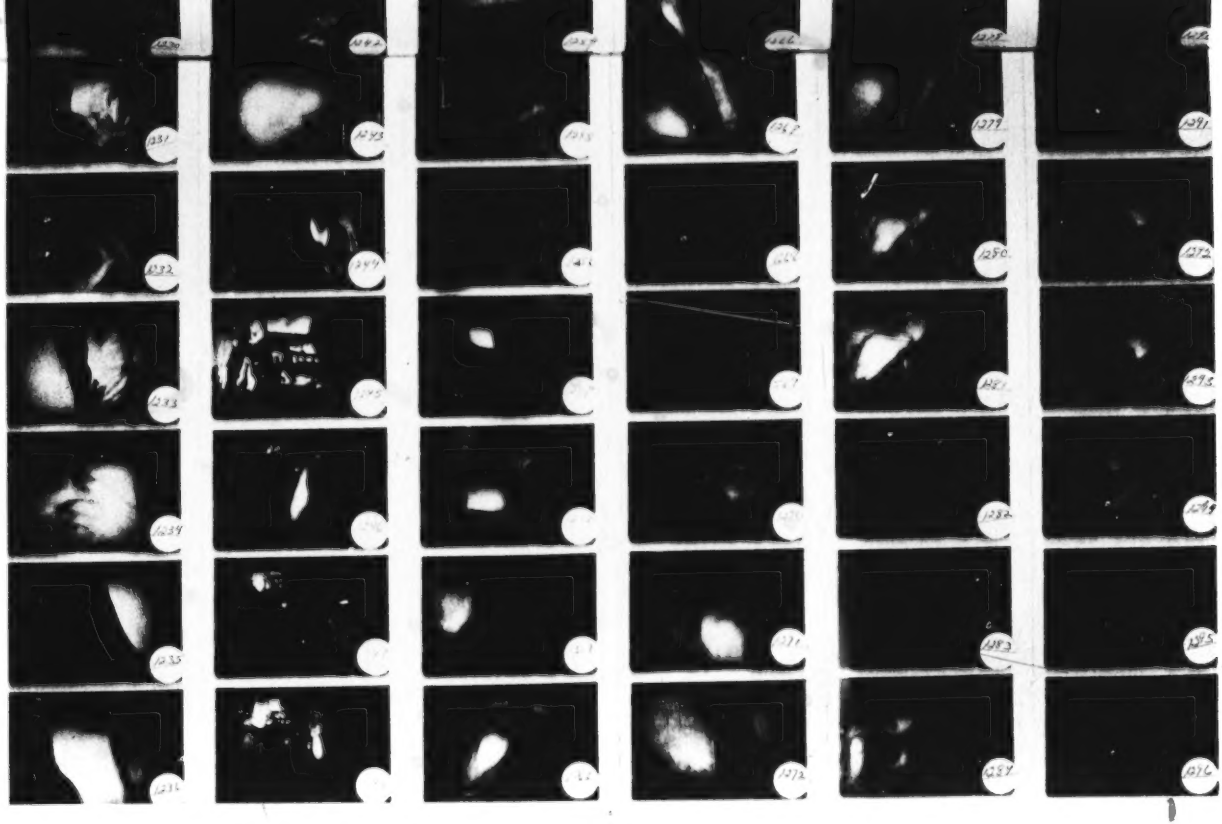
"DIRT BIKE BANGERS"

TIME-MOTION STUDY OF FILMS "CHATEAU" AND "DIRT BIKE BANGERS" - PART 18 of 19 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 23, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384.





"DIRT BIKE BANGERS" - Sexual intercourse 1273-1284

TIME-MOTION STUDY OF FILMS "CHATEAU" AND "DIRT BIKE BANGERS" · PART 19 of 19 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

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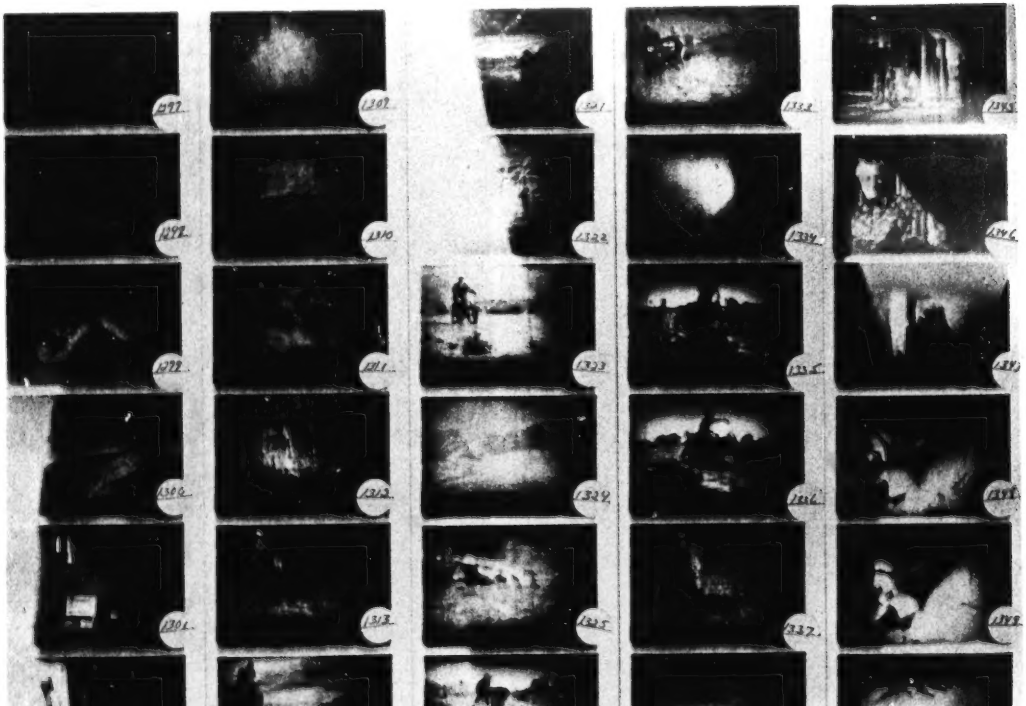
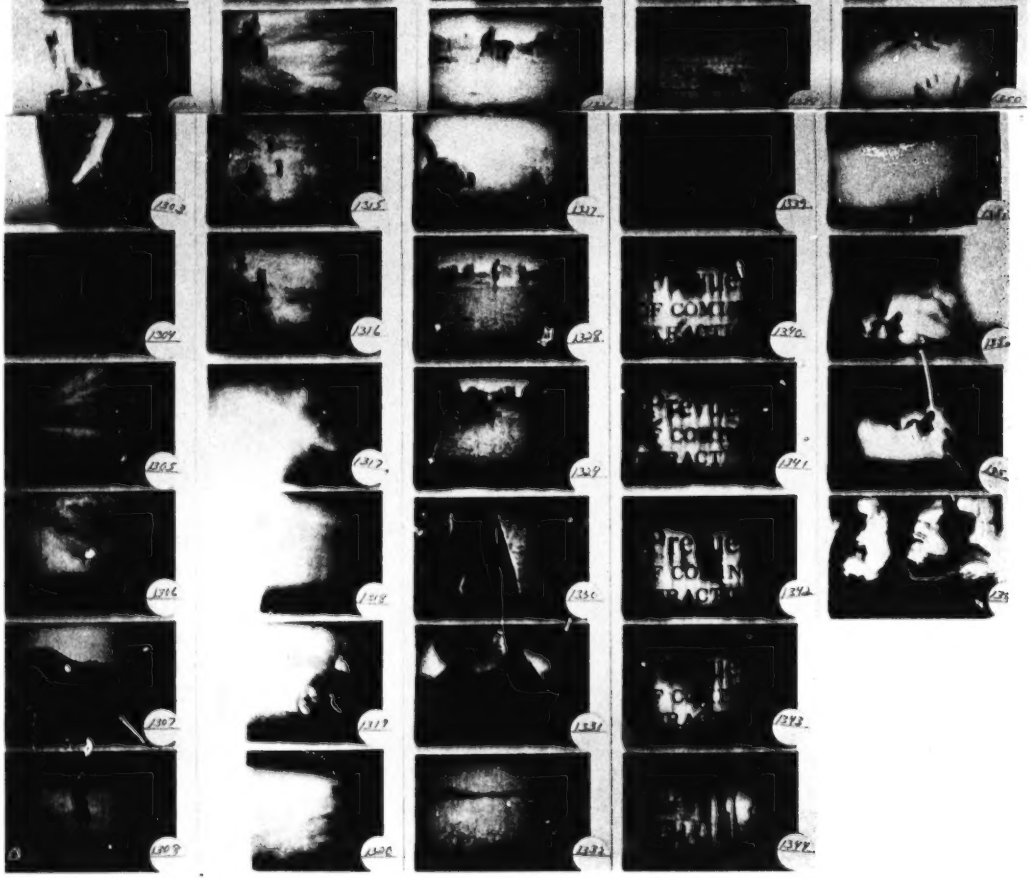




"DIRT BIKE BANGERS" · End 1338, Previews 1340-1359

## Appendix R


| | Page |
|---|---|
| Affidavit of Larry Winegardner. . . . . | 3-5 |
| Time Motion Study of Films "Hundred Dollar Wife" and "Massage Parlor" filed with Three Judge District Court on Feb. 12, 1973, with supporting affidavit of Policeman Larry Winegardner in support of motion to dismiss in *Pursue Ltd. v. Huffman et al.* C72-432. . . . . | 6-51 |

AFFIDAVIT

STATE OF OHIO
SS:
ALLEN COUNTY

LARRY WINEGARDNER, being first duly sworn, says that he is a policeman for the City of Lima, Ohio; that on January 24, 1975, he paid $3.00 and was admitted to the Cinema I Theatre, 69 Public Square, Lima, Ohio, and that he viewed two motion pictures entitled "Hundred Dollar Wife" and "Massage Parlor".

Affiant says that attached hereto and incorporated by reference is a time motion study of said motion pictures; that said photographs appear in the chronological order in which they were taken and as numbered; that said photographs reflect that which was depicted on the screen at the time in the program as depicted on said photographs; and that said photographs are true and accurate representations of that which affiant saw projected on the motion picture screen at said location on said date.

Affiant says that he viewed a multitude of various sexual acts performed in said motion pictures and depicted upon said motion picture screen at said location on said date; and that the attached photographs depict accurately the said sexual acts viewed by affiant as follows:

| | | |
|---|---|---|
| 1. | at photographs 100-111 | fellatio |
| 2. | at photographs 120-122 | Sexual intercourse |
| 3. | at photographs 124-128 | cunnilingus |
| 4. | at photographs 145-152 | cunnilingus |
| 5. | at photographs 182-186 | fellatio |
| 6. | at photographs 196-208 | cunnilingus |
| 7. | at photographs 215-217 | cunnilingus |
| 8. | at photographs 222-224 | fellatio |

| | | |
|---|---|---|
| 9. | at photographs 228-239 | male performing cunnilingus on female; female performing fellatio on male |
| 10. | at photographs 240-252 | cunnilingus |
| 11. | at photographs 270-285 | sexual intercourse |
| 12. | at photographs 286-288 | male performing cunnilingus on female; female performing fellatio on male |
| 13. | at photographs 291-344 | sexual intercourse |
| 14. | at photographs 401-459 | lesbianism |
| 15. | at photographs 429-458 | cunnilingus (female on female) |
| 16. | at photographs 540-541 | sexual intercourse |
| 17. | at photographs 566-568 | cunnilingus |
| 18. | at photographs 572-577 | fellatio |
| 19. | at photographs 579-594 | sexual intercourse |
| 20. | at photographs 611-632 | sexual intercourse |
| 21. | at photographs 611-615 | close-up of penetration |
| 22. | at photographs 745 | sexual intercourse |
| 23. | at photographs 790-791 | cunnilingus |
| 24. | at photographs 956-990 | fellatio |
| 25. | at photographs 1059-1100 | female puts male penis in hot dog bun and performs fellatio |
| 26. | at photographs 1109-1146 | cunnilingus |
| 27. | at photographs 1157-1169 | sexual intercourse |
| 28. | at photographs 1170-1192 | male performing cunnilingus on female; female performing fellatio on male |
| 29. | at photographs 1193-1208 | sexual intercourse |
| 30. | at photographs 1219-1247 | sexual intercourse |
| 31. | at photographs 1248-1282 | sexual intercourse |
| 32. | at photographs 1287-1307 | sexual intercourse |

| | | |
|---|---|---|
| 33. | at photographs 1308-1340 | sexual intercourse |
| 34. | at photographs 1341-1367 | sexual intercourse |
| 35. | at photographs 1371-1375 | cunnilingus |
| 36. | at photographs 1417-1441 | group sex (cunnilingus, anal sodomy, etc) |
| 37. | at photographs 1494-1505 | fellatio |
| 38. | at photographs 1531-1537 | sexual intercourse |
| 39. | at photographs 1538-1540 | fellatio |
| 40. | at photographs 1541-1543 | sexual intercourse |
| 41. | at photographs 1555-1561 | sexual intercourse |
| 42. | at photographs 1562-1566 | cunnilingus |
| 43. | at photographs 1567-1569 | sexual intercourse |
| 44. | at photographs 1570-1574 | cunnilingus performed on female by male; fellatio performed on male by female |
| 45. | at photographs 1575-1576 | sexual intercourse |
| 46. | at photographs 1577-1578 | cunnilingus |
| 47. | at photographs 1579-1584 | fellatio |

Further affiant saith not.

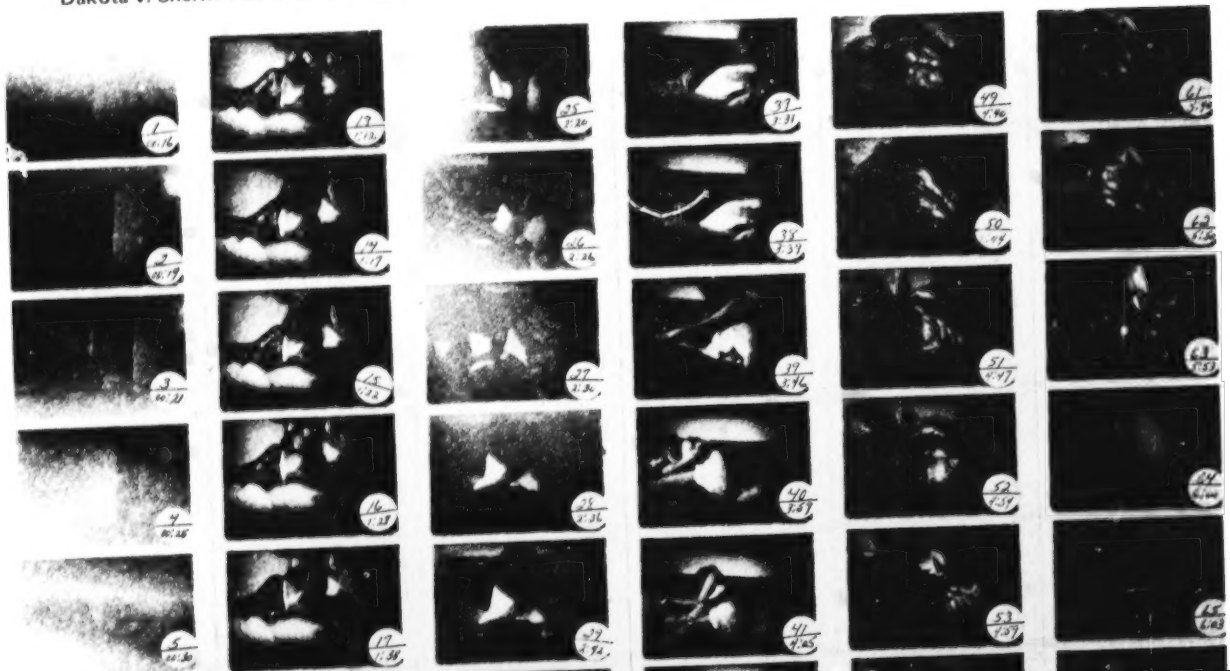
Sworn to before me and subscribed in my presence, this 6TH day of February, 1973.

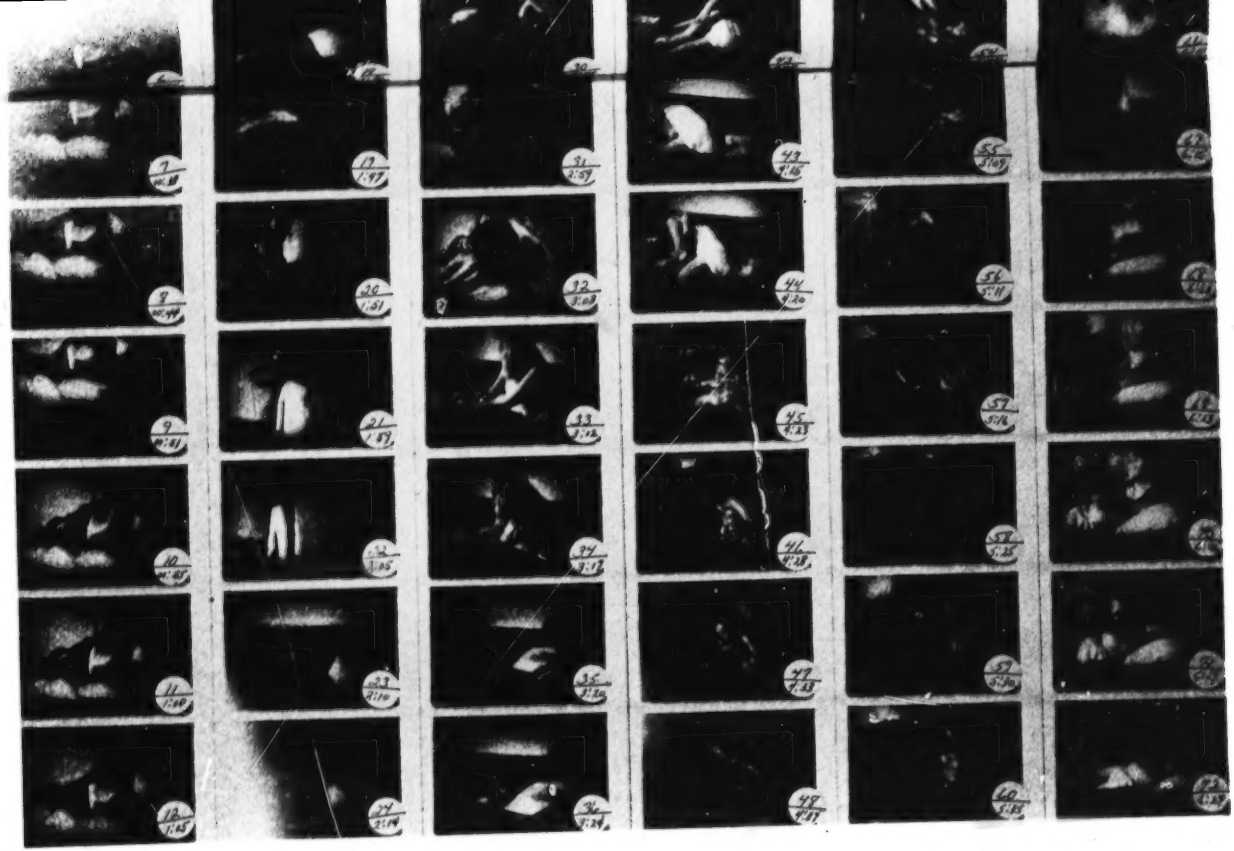
Notary Public

TIME-MOTION STUDY OF FILMS "100 DOLLAR WIFE" AND "MASSAGE PARLOR" - PART 1 of 23 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 24, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384.





"100 DOLLAR WIFE"

TIME-MOTION STUDY OF FILMS "100 DOLLAR WIFE" AND "MASSAGE PARLOR" - PART 2 of 23 PARTS

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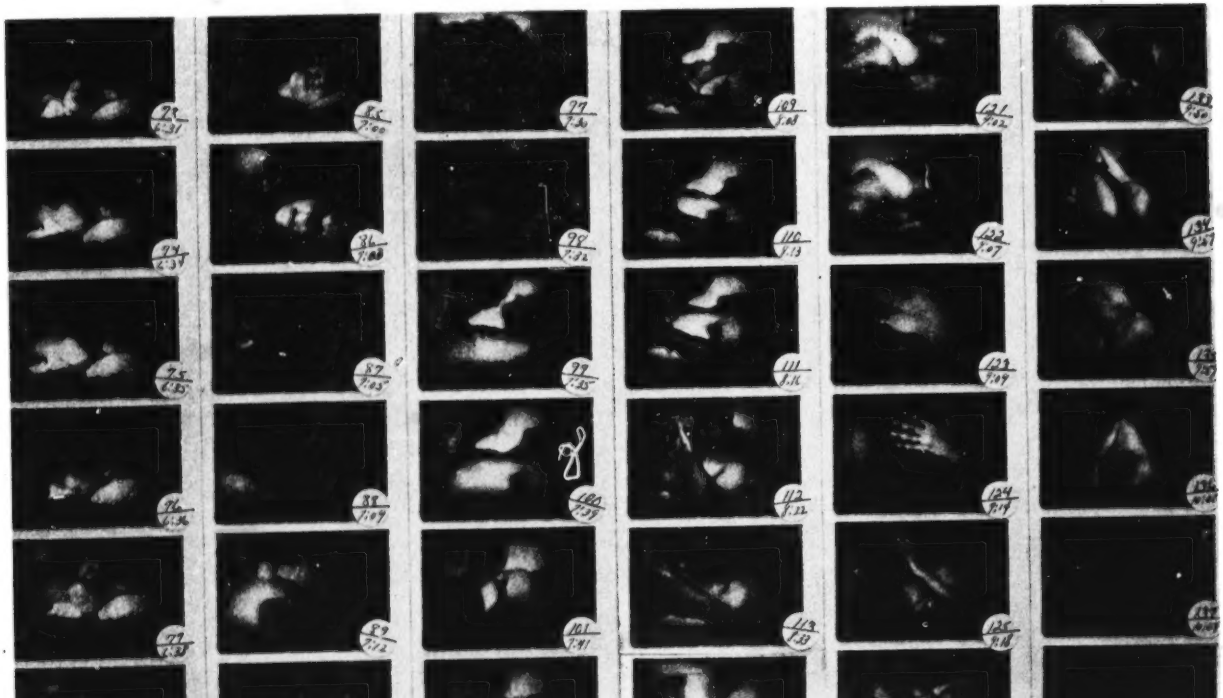

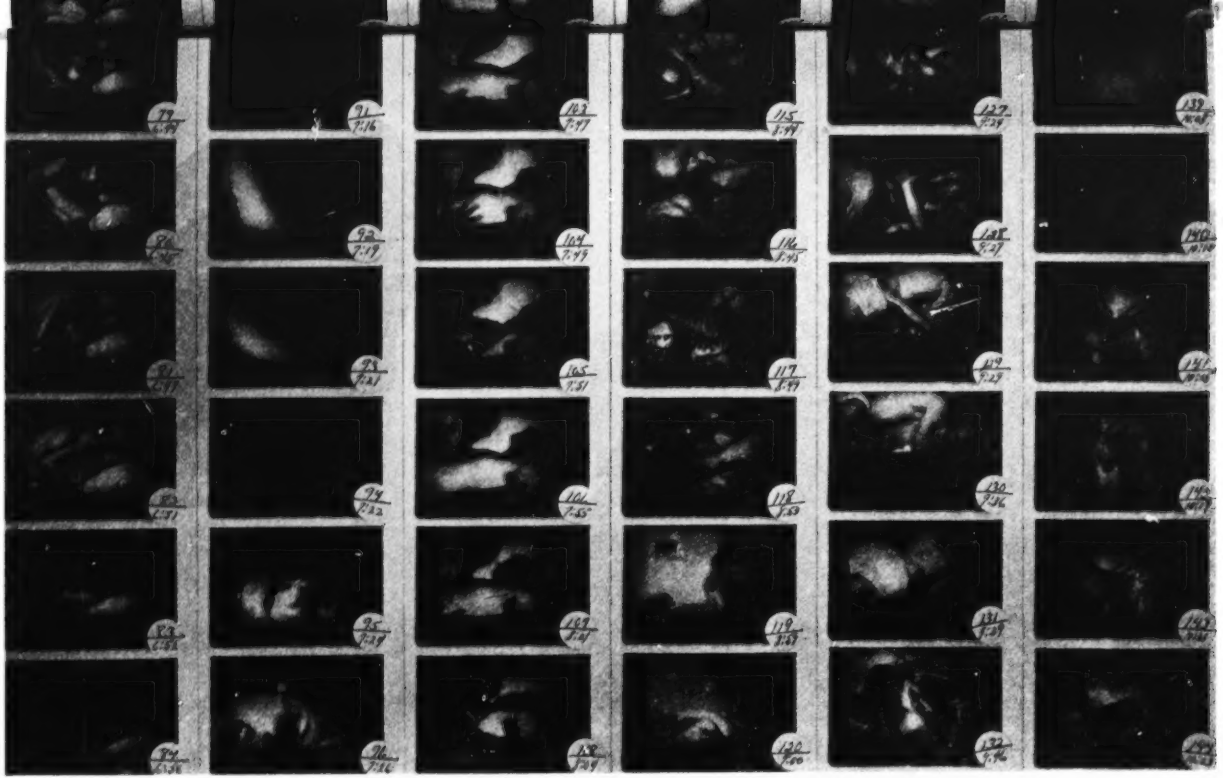

"100 DOLLAR WIFE" - Fellatio 100-111, sexual intercourse 120-122, cunnilingus 124-128

TIME-MOTION STUDY OF FILMS "100 DOLLAR WIFE" AND "MASSAGE PARLOR" - PART 3 of 23 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

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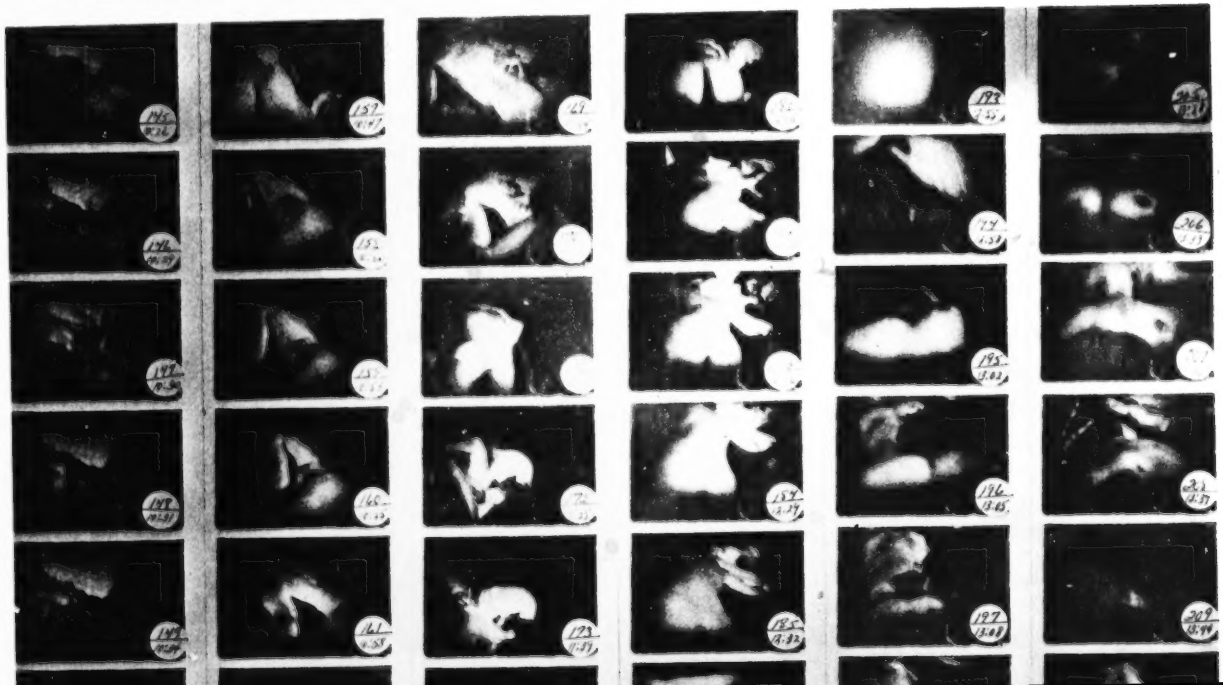

"100 DOLLAR WIFE" - Cunnilingus 145-152, fellatio 182-186, cunnilingus 196-208, 215-216

TIME-MOTION STUDY OF FILMS "100 DOLLAR WIFE" AND "MASSAGE PARLOR" - PART 4 of 23 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

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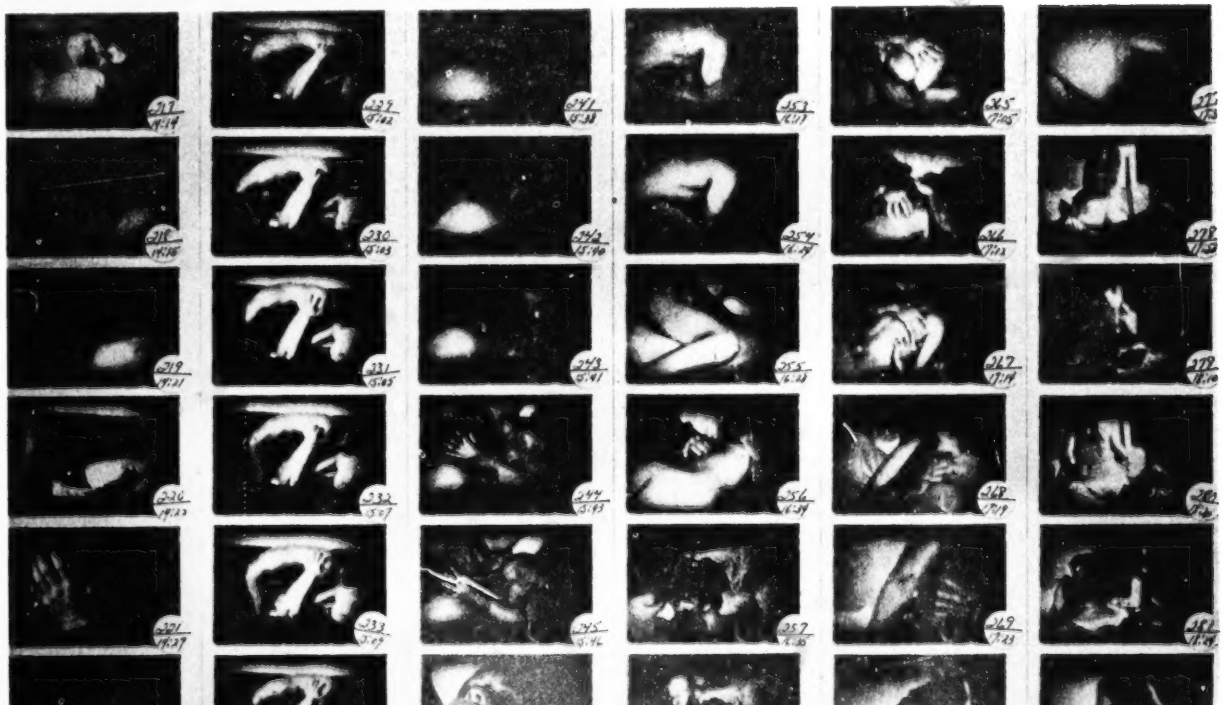

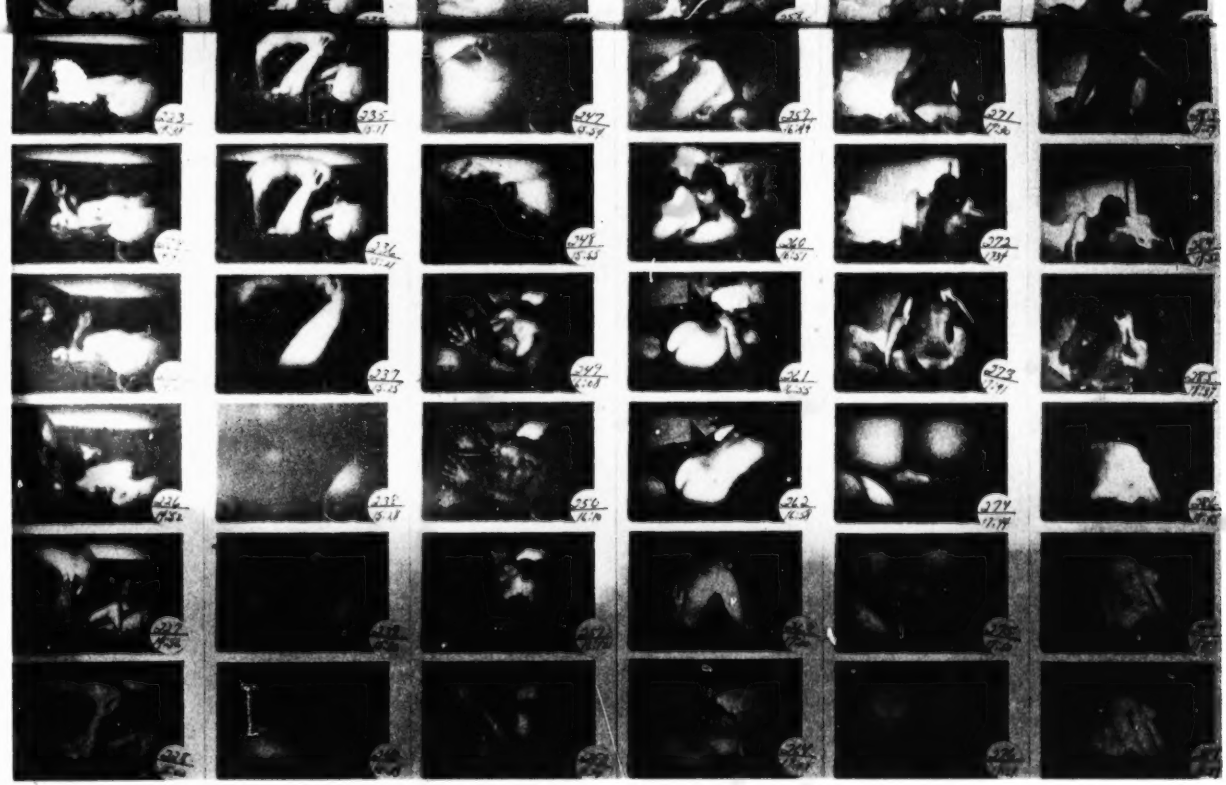

"100 DOLLAR WIFE" - Cunnilingus 217, fellatio 222-224, male & female performing simultaneous fellatio & cunnilingus 228-239, cunnilingus 240-252, sexual intercourse 270-285, male & female performing fellatio & cunnilingus on each other 286-288

TIME-MOTION STUDY OF FILMS "100 DOLLAR WIFE" AND "MASSAGE PARLOR" - PART 5 of 23 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

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"100 DOLLAR WIFE" - Sexual intercourse 291-344

TIME-MOTION STUDY OF FILMS "100 DOLLAR WIFE" AND "MASSAGE PARLOR" - PART 6 of 23 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

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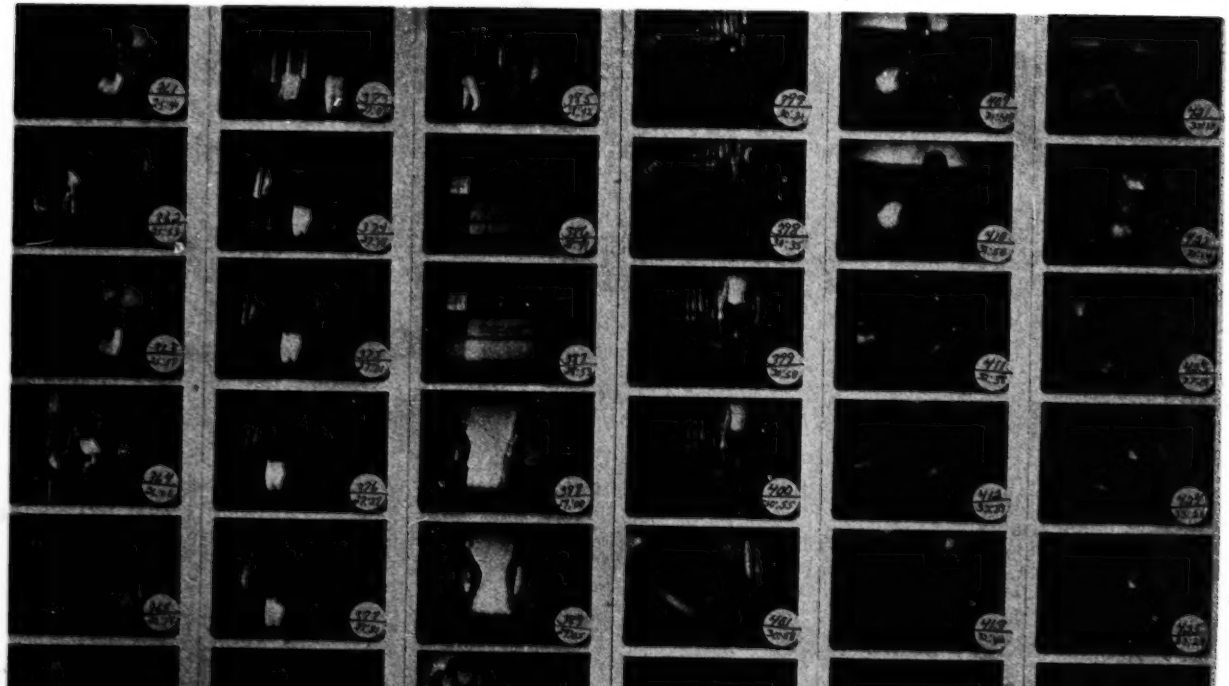

"100 DOLLAR WIFE" - Lesbianism, cunnilingus (female on female) 401-432

TIME-MOTION STUDY OF FILMS "100 DOLLAR WIFE" AND "MASSAGE PARLOR" - PART 7 of 23 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

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"100 DOLLAR WIFE" - Lesbianism, cunnilingus 433-458

TIME-MOTION STUDY OF FILMS "100 DOLLAR WIFE" AND "MASSAGE PARLOR" - PART 8 of 23 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

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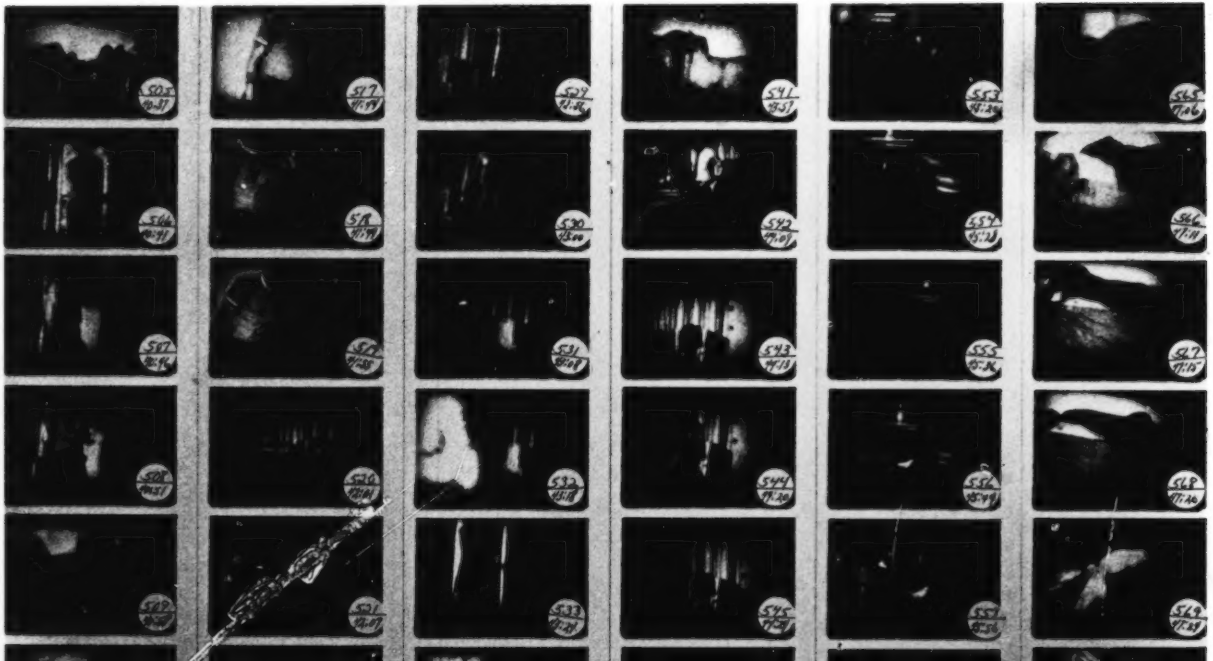

"100 DOLLAR WIFE" - Sexual intercourse 540-541, cunnilingus 566-568, fellatio 572-576

TIME-MOTION STUDY OF FILMS "100 DOLLAR WIFE" AND "MASSAGE PARLOR" - PART 9 of 23 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

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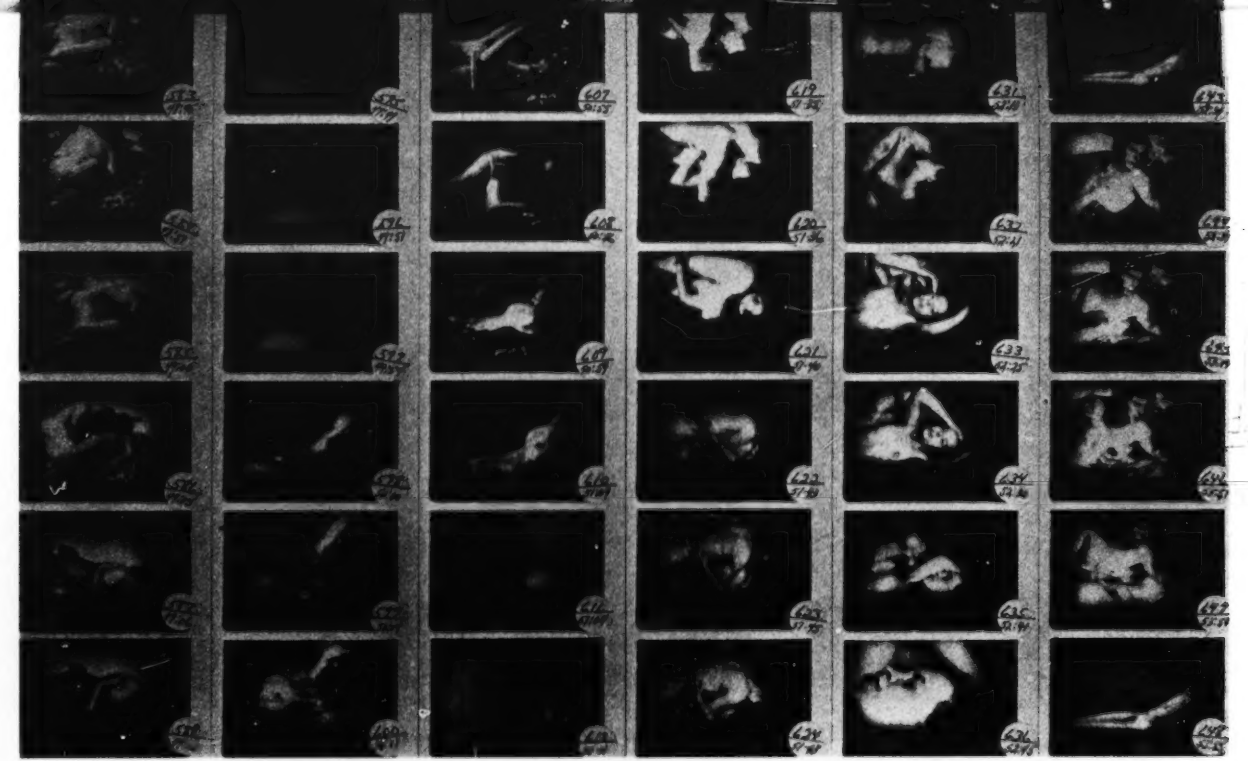

"100 DOLLAR WIFE" - Fellatio 577, sexual intercourse 579-594, 611-630 (penetration closeup)

TIME-MOTION STUDY OF FILMS "100 DOLLAR WIFE" AND "MASSAGE PARLOR" - PART 10 of 23 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

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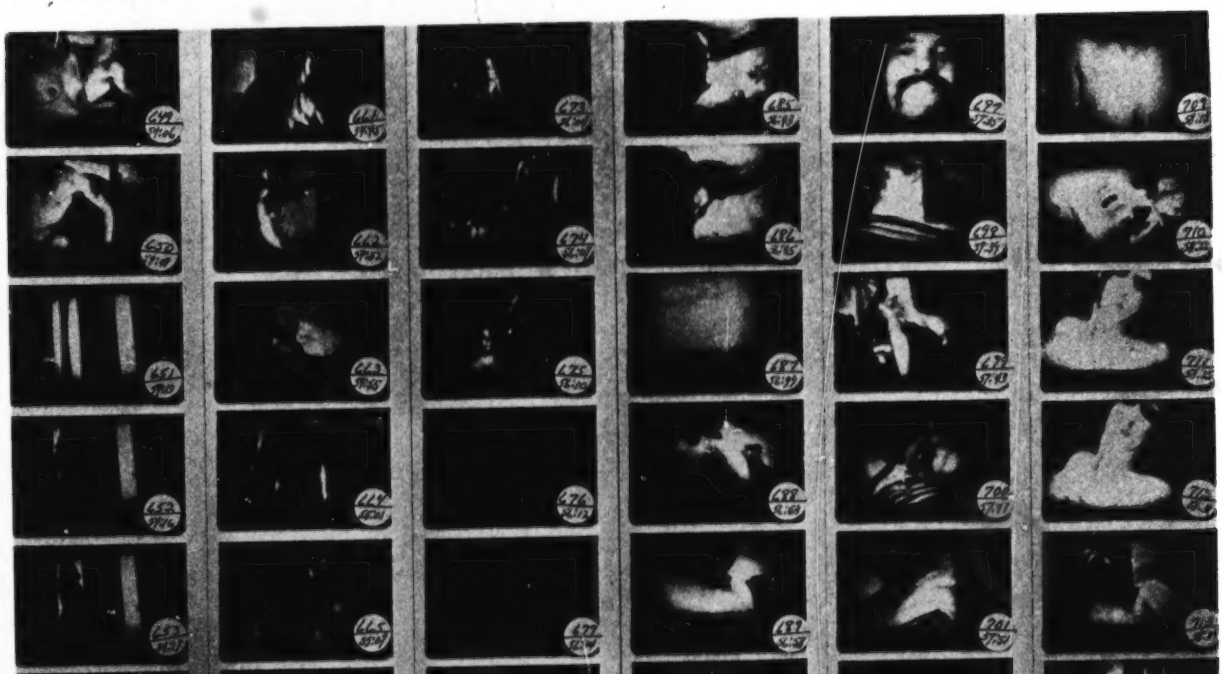

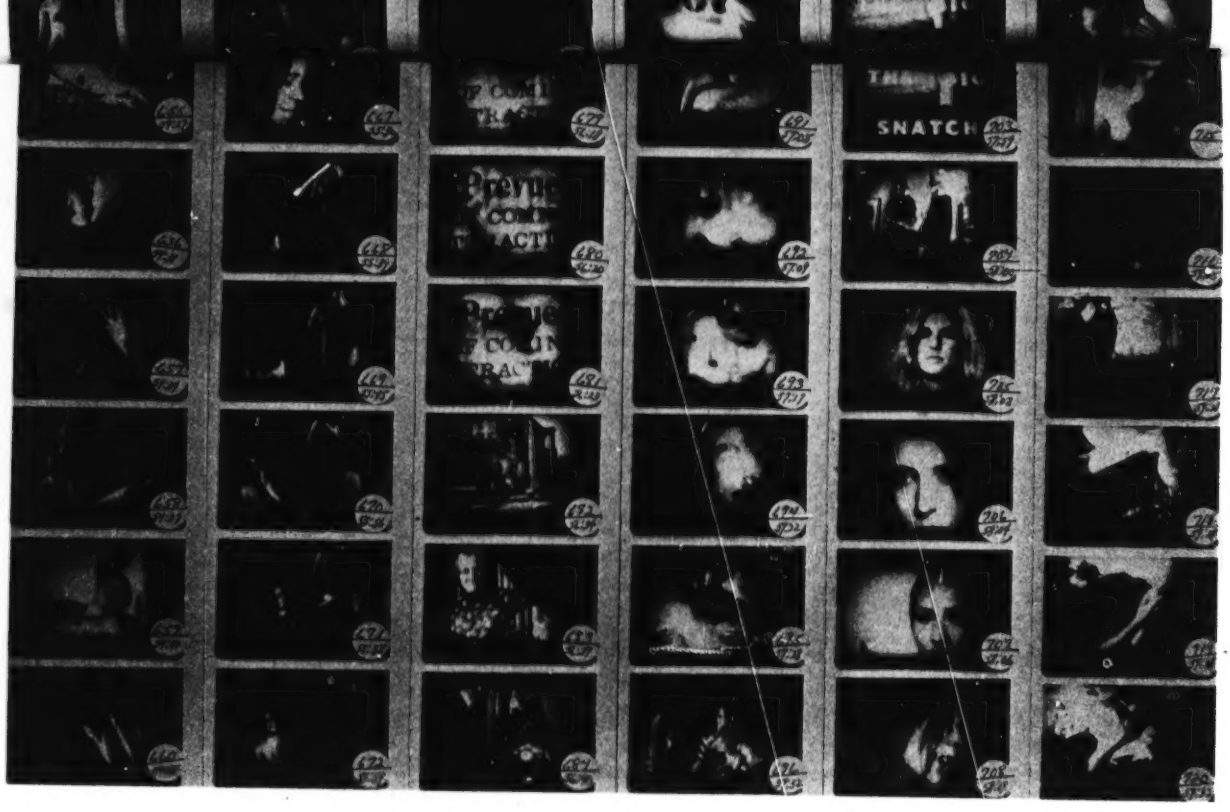


"100 DOLLAR WIFE" - End 678 - Previews 679-720

TIME-MOTION STUDY OF FILMS "100 DOLLAR WIFE" AND "MASSAGE PARLOR" - PART 11 of 23 PARTS

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"100 DOLLAR WIFE" - Previews 721-792 (cunnilingus 790-791)

TIME-MOTION STUDY OF FILMS "100 DOLLAR WIFE" AND "MASSAGE PARLOR" - PART 12 of 23 PARTS

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"MASSAGE PARLOR" - Previews 793-797, "Massage Parlor" title 798-799

TIME-MOTION STUDY OF FILMS "100 DOLLAR WIFE" AND "MASSAGE PARLOR" - PART 13 of 23 PARTS

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"MASSAGE PARLOR"

TIME-MOTION STUDY OF FILMS "100 DOLLAR WIFE" AND "MASSAGE PARLOR" - PART 14 of 23 PARTS

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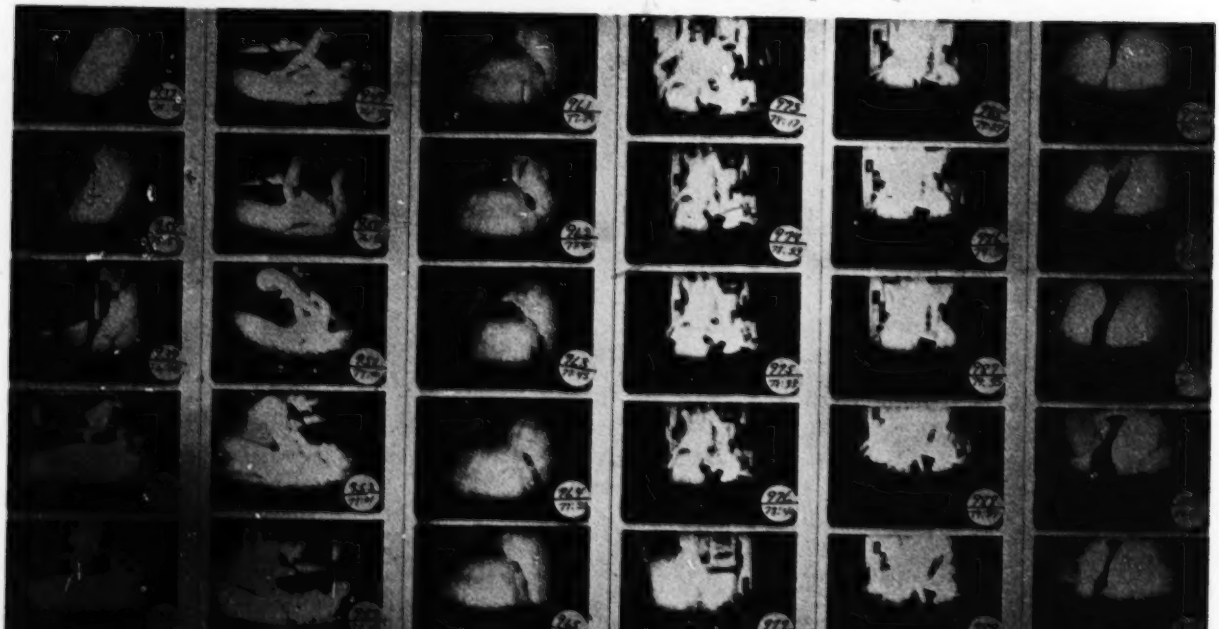

"MASSAGE PARLOR" - Fellatio 956-990

TIME-MOTION STUDY OF FILMS "100 DOLLAR WIFE" AND "MASSAGE PARLOR" - PART 15 of 23 PARTS

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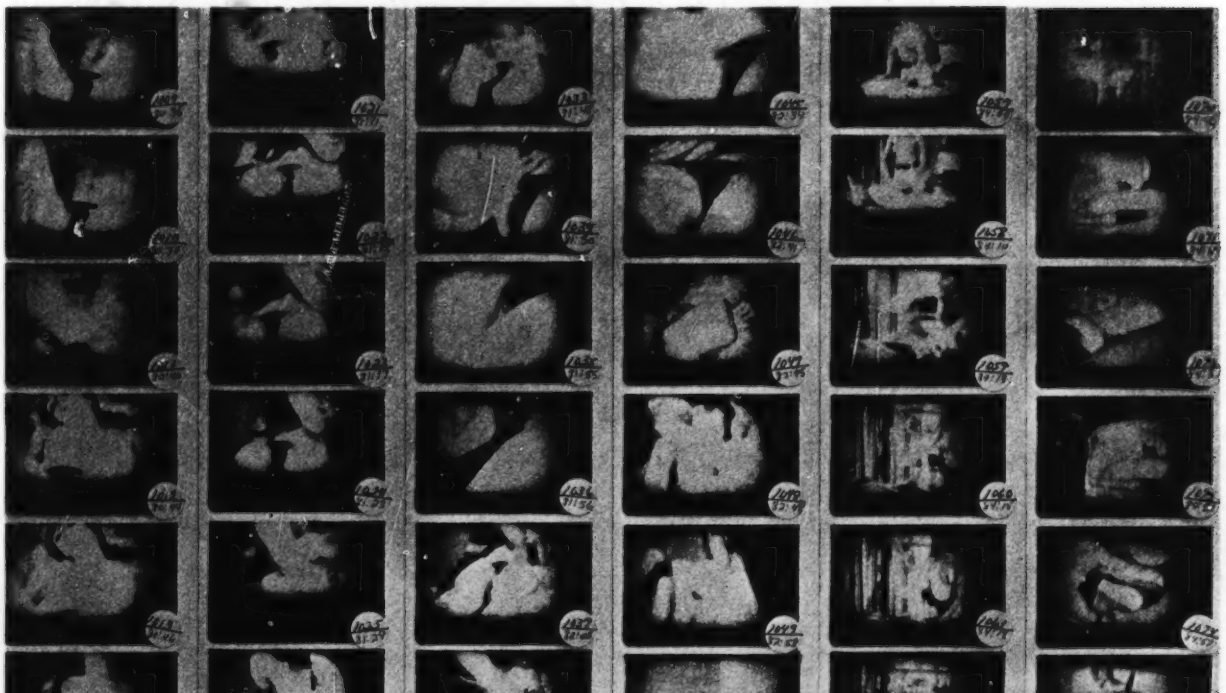

"MASSAGE PARLOR" - Female inserts male penis in hot dog bun & performs fellatio 1059-1080

TIME-MOTION STUDY OF FILMS "100 DOLLAR WIFE" AND "MASSAGE PARLOR" - PART 16 of 23 PARTS

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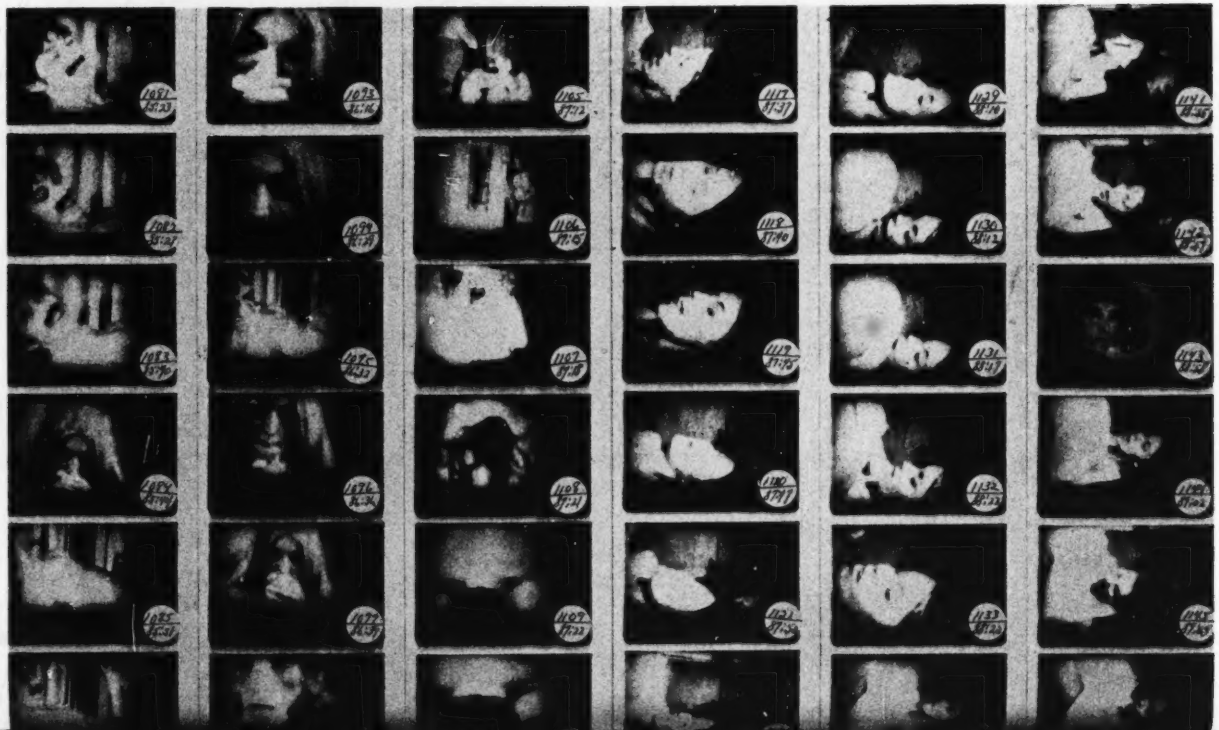

"MASSAGE PARLOR" - Fellatio 1081-1100, cunnilingus 1109-1146

TIME-MOTION STUDY OF FILMS "100 DOLLAR WIFE" AND "MASSAGE PARLOR" - PART 17 of 23 PARTS

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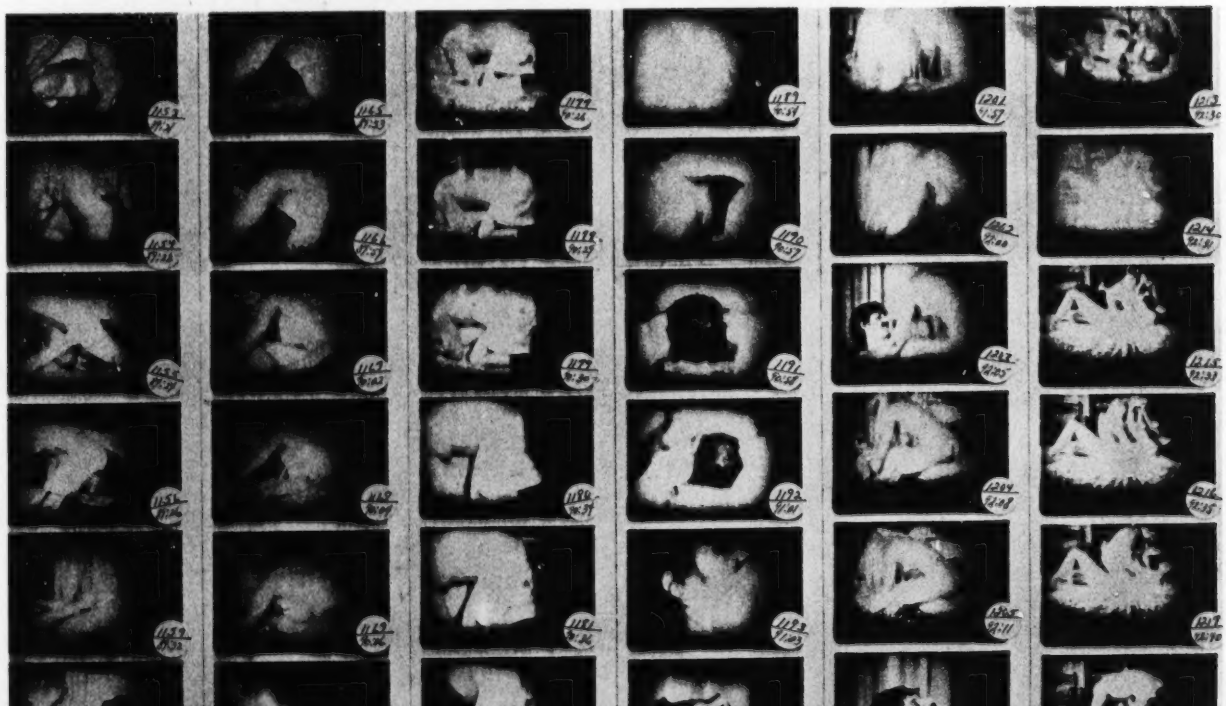

"MASSAGE PARLOR" - Sexual intercourse 1157-1169, male and female perform cunnilingus and fellatio on each other 1170-1192, sexual intercourse 1193-1208, 1219-1224

TIME-MOTION STUDY OF FILMS "100 DOLLAR WIFE" AND "MASSAGE PARLOR" - PART 18 of 23 PARTS

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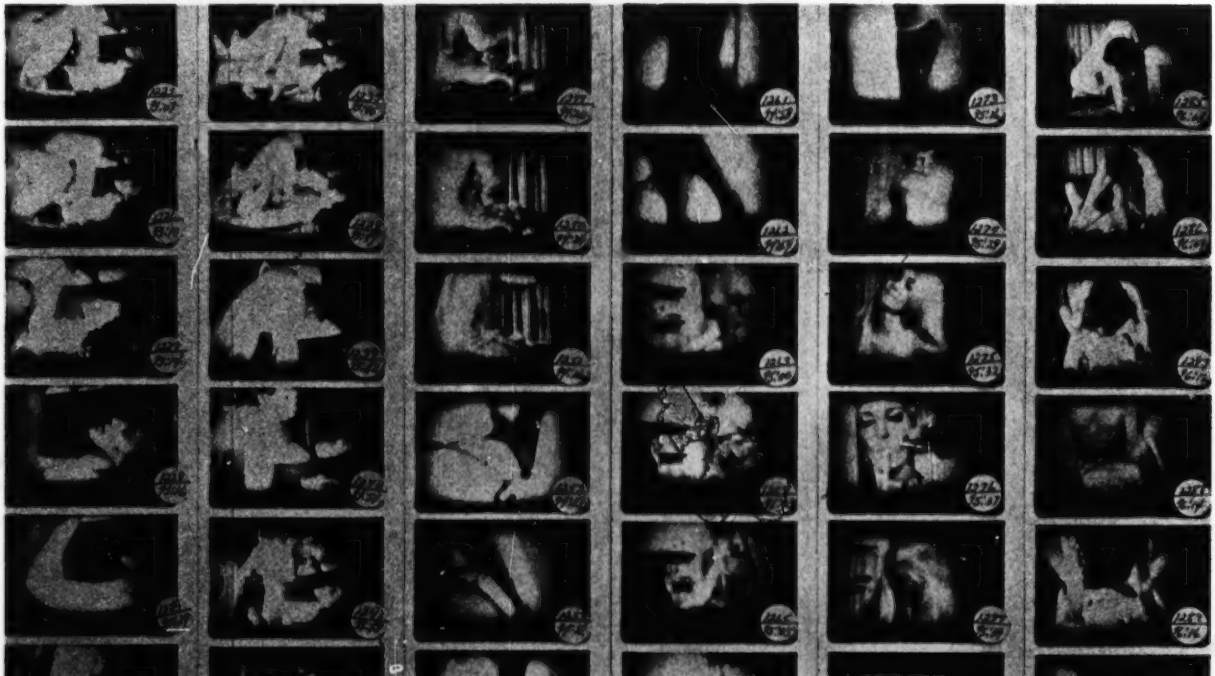

"MASSAGE PARLOR" - Sexual intercourse 1225-1247, 1248-1282, 1287-1296

TIME-MOTION STUDY OF FILMS "100 DOLLAR WIFE" AND "MASSAGE PARLOR" - PART 19 of 23 PARTS

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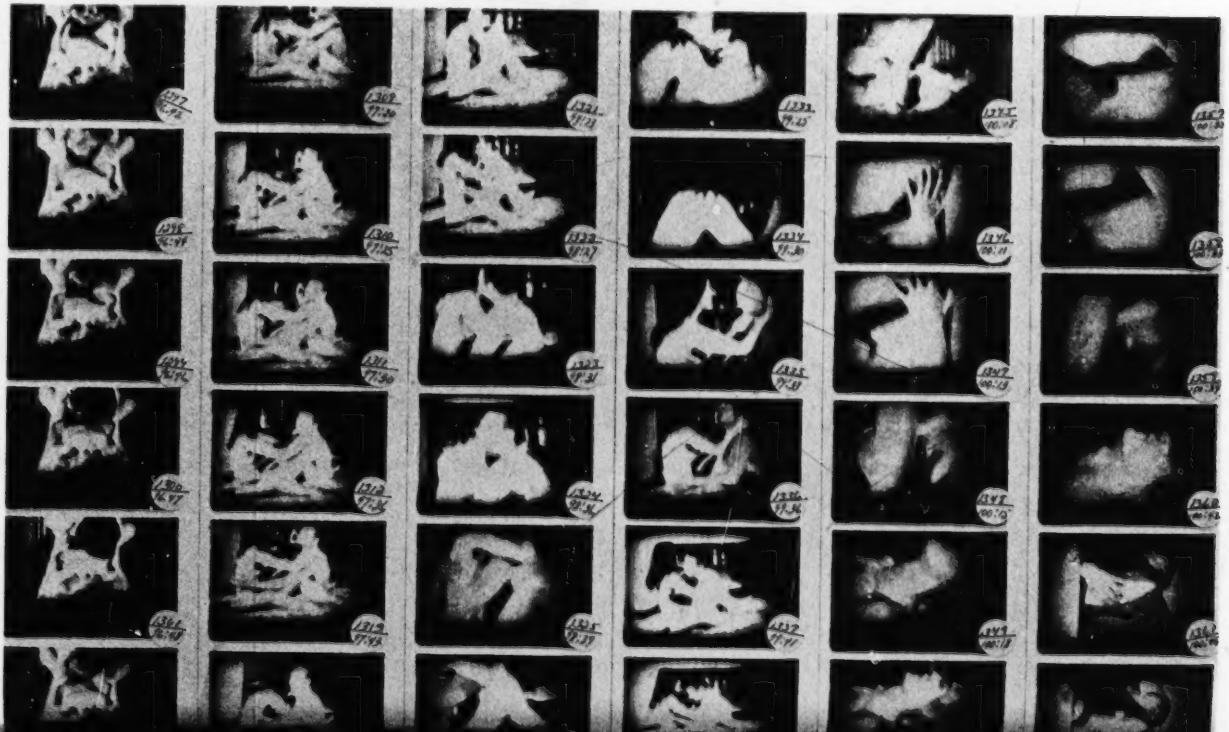

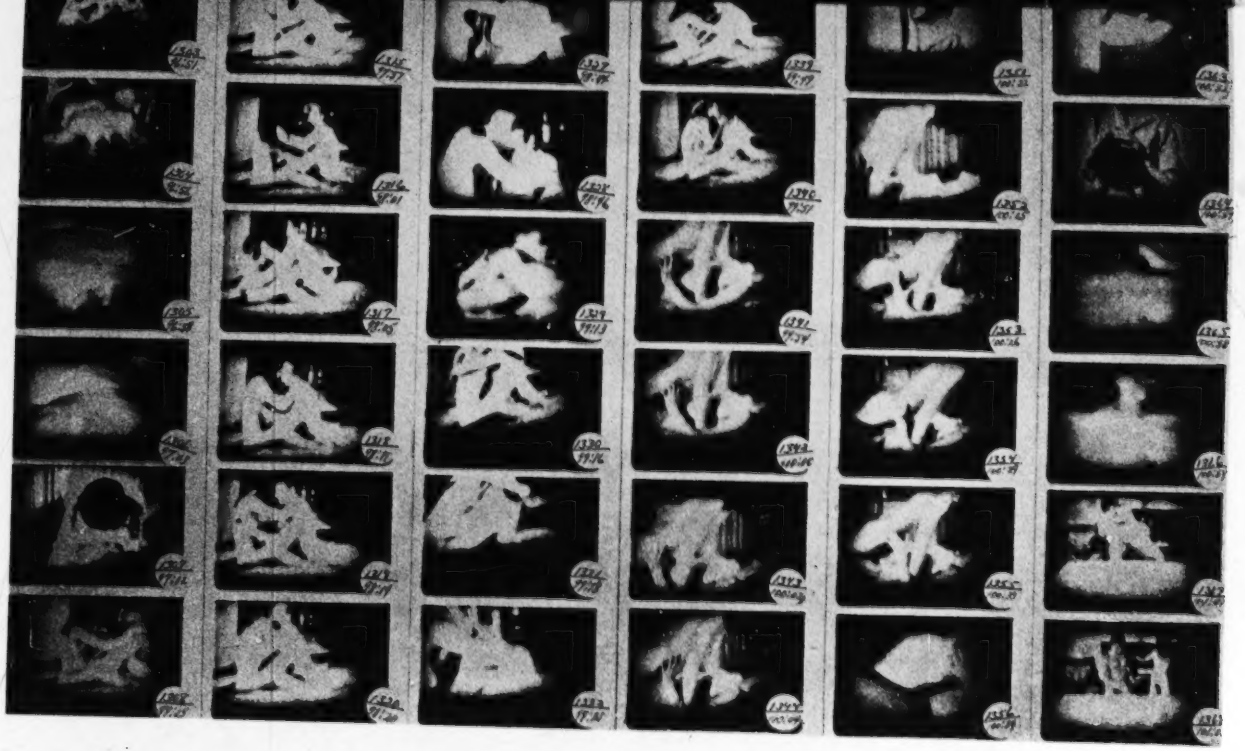

"MASSAGE PARLOR" - Sexual intercourse 1297-1367

TIME-MOTION STUDY OF FILMS "100 DOLLAR WIFE" AND "MASSAGE PARLOR" - PART 20 of 23 PARTS

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"MASSAGE PARLOR" - Cunnilingus 1371-1375, group sex (cunnilingus, anal sodomy, etc.) 1417-1440

TIME-MOTION STUDY OF FILMS "100 DOLLAR WIFE" AND "MASSAGE PARLOR" - PART 21 of 23 PARTS

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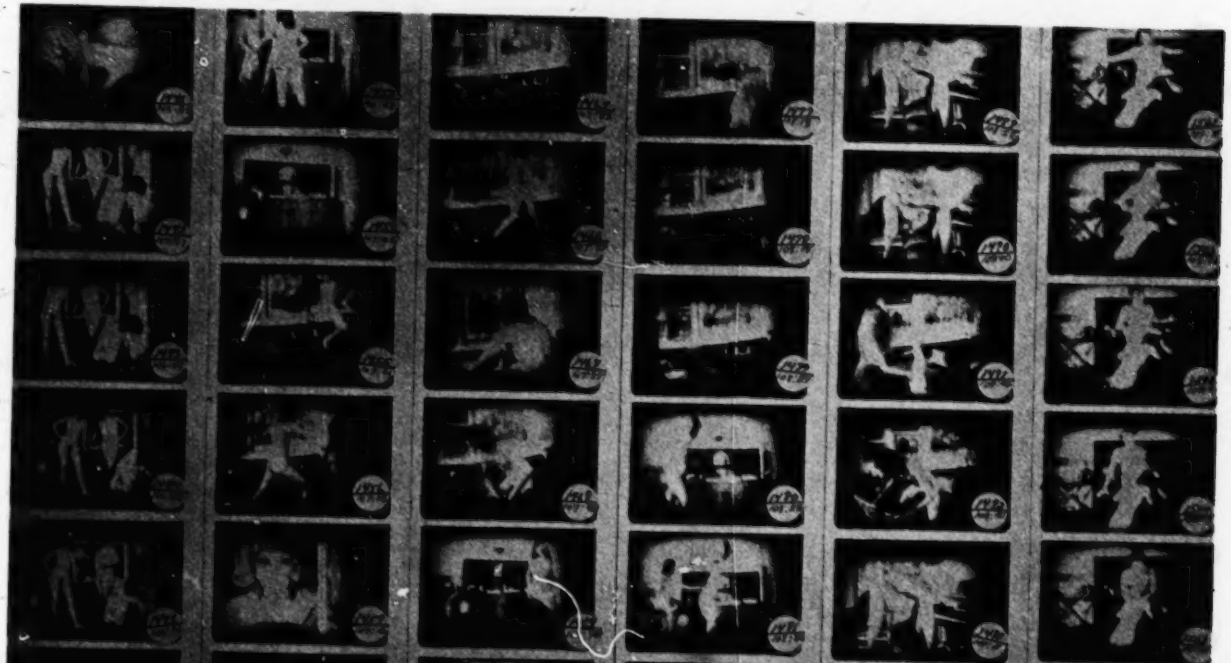

"MASSAGE PARLOR" - Fellatio 1494-1505

TIME-MOTION STUDY OF FILMS "100 DOLLAR WIFE" AND "MASSAGE PARLOR" - PART 22 of 23 PARTS

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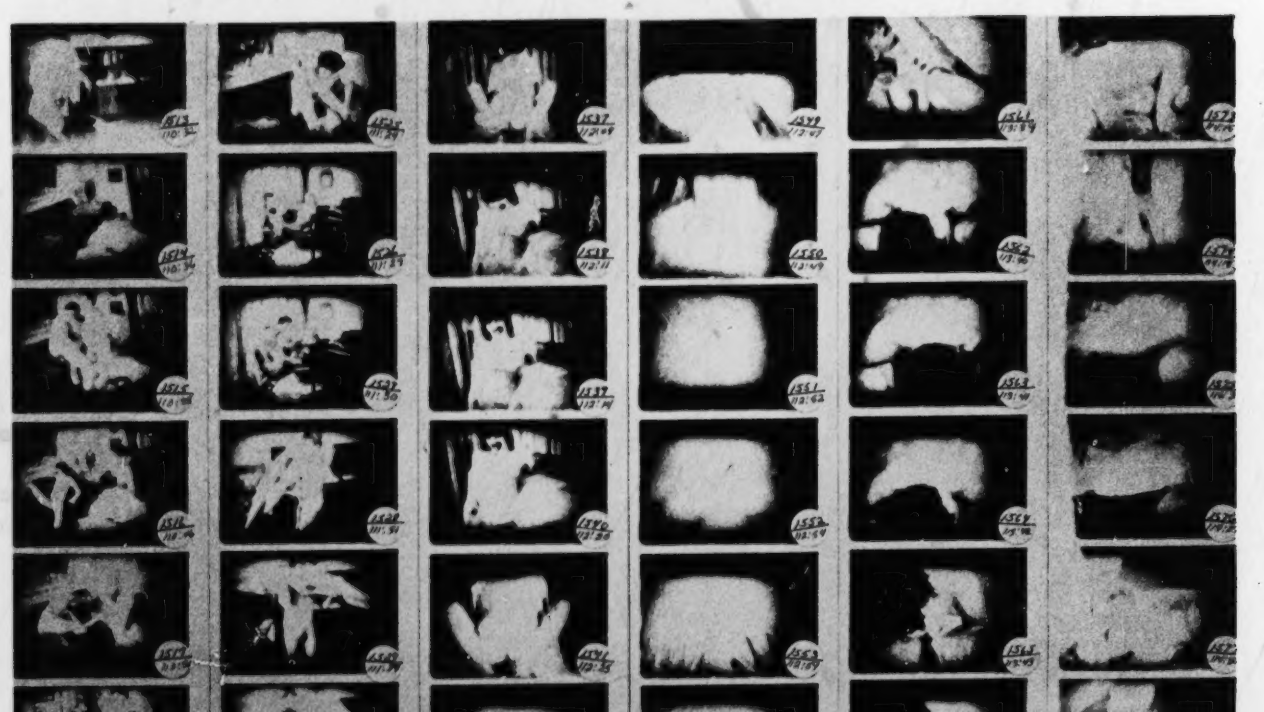
**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 24, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384

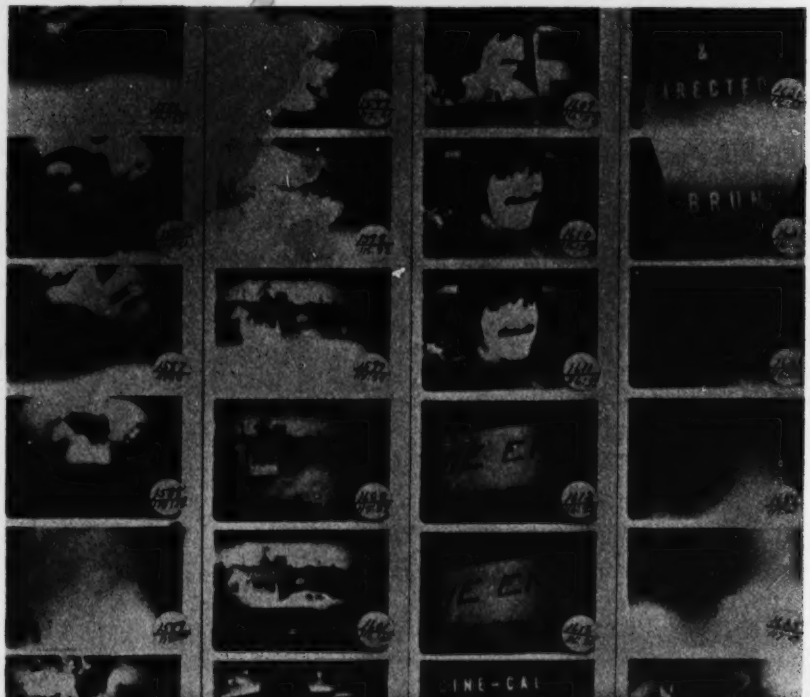


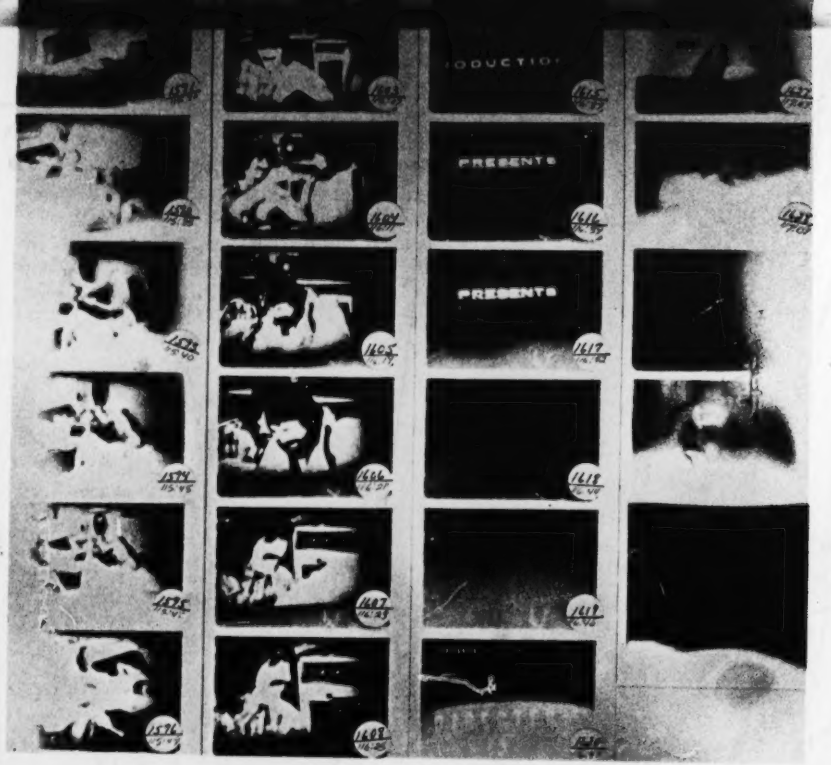
"MASSAGE PARLOR" - Sexual intercourse 1531-1537, fellatio 1538-1540, sexual intercourse 1541-1543, 1555-1561, cunnilingus 1562-1566, sexual intercourse 1567-1569, cunnilingus, fellatio by male & female 1570-1574, cunnilingus 1577-1578, fellatio 1579-1584

TIME-MOTION STUDY OF FILMS "100 DOLLAR WIFE" AND "MASSAGE PARLOR" - PART 23 of 23 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 24, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384.






"MASSAGE PARLOR" - End 1612-1613

## Appendix S

*William H. Dakota v. State of Ohio ex rel Lawrence S. Huffman,* C72-445, (being a Removal Action in the United States District Court for the Northern District of Ohio, Western Division)

Papers Included in Appendix: Page

Order of Judge Walinski on motion to dismiss, sua sponte, as moot. . . . . 3

In conformity with Rule 77 (d) F.R.C.P.
[illegible] take notice that the [illegible] order of judgment
was entered in this cause
APR 26 1973
Dominic J. Cimino, Clerk

FILED
Apr 26 4 00 PM '73
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

STATE OF OHIO, ex rel.
LAWRENCE S. HUFFMAN,

Respondent, ) No. C 72-445
)
-vs- )
)
WILLIAM H. DAKOTA, et al., ) OPINION and ORDER
)
Petitioner. )

* * *

WALINSKI, J:

This cause came to be heard on a motion to dismiss sua sponte as moot.

It appearing to the Court that this Court's opinion in Pursue Ltd. v. Hoffman (C 72-432) (N.D. Ohio, April 20, 1973) has mooted the instant action, it is

ORDERED that this case should be and hereby is dismissed.

Richard A. Walinski
UNITED STATES DISTRICT JUDGE

Toledo, Ohio.

April 26, 1973.

# Appendix T

*State of Ohio, ex rel Lawrence S. Huffman v. William H. Dakota et al., 72* CIV 0326 (being a Civil Action in the Court of Common Pleas of Allen County Ohio, to abate the Cinema I Theater as a public nuisance)

Papers Included in Appendix: Page

Motion of Plaintiff State of Ohio ex rel Huffman, filed May 1, 1973 ..... 3-4

Journal Entry, filed May 1, 1973 ..... 5

Subpena Duces Tecum issued May 1, 1973 ..... 6

FILED
1973 MAY 1 ... 30
ROBERT H. ...
CLERK OF ...
ALLEN ... OHIO

IN THE COURT OF COMMON PLEAS OF ALLEN COUNTY, OHIO

| | | |
|---|---|---|
| STATE OF OHIO ex rel LAWRENCE S. HUFFMAN | : | |
| Plaintiff | : | CASE NO. 72 CIV 0326 |
| -vs- | : | |
| WILLIAM H. DAKOTA, et al | : | MOTION |
| Defendant | : | |
| | : | |

.. .. .. .. .. .. .. .. .. .. .. .. .. .. .. ..

Plaintiff says that on October 24, 1972, the Court Ordered the Cinema I Theater, #69 Public Square, Lima, Ohio, closed for the purpose of the projection or screening of lewd, lascivious, indecent, or obscene films and that the defendant Robert Smith was personally served a copy of said Order.

Plaintiff says that on November 30, 1972, the Court extended its Order of October 24, 1972, and further permanently enjoined and restrained Robert Smith from conducting said nuisance and said Robert Smith received notice of said Order.

Plaintiff says that Robert Smith has violated the terms of said Orders by exhibiting in said theater on May 1, 1973, obscene motion picture films allegedly entitled "Just Married", "Back Door" and "Bob Dick" which depict numerous scenes of sexual intercourse, cunnilingus, and fellatio.

Wherefore, plaintiff requests that the Court direct Robert Smith to appear before the Court with said motion picture films forthwith so that the Court might determine whether said films are obsceno and upon such determination to

require said Robert Smith to account for the box office receipts derived from the exhibition of such films, and forfeit the same.

Lawrence S. Huffman

Lawrence S. Huffman

STATE OF OHIO
SS:
ALLEN COUNTY

LAWRENCE S. HUFFMAN, being first duly sworn, deposes and says that he has read the foregoing Motion and that the facts and allegations contained therein are true as he verily believes.

Sworn to before me and subscribed in my presence, this 1ST day of May, 1973.

Notary Public

GARY R. HERSCH
Notary Public, State of Ohio
My Commission Has no Expiration Date

T-5

1973 MAY -1 PM 4:20

ROBERT [illegible]

IN THE COURT OF COMMON PLEAS OF ALLEN COUNTY, OHIO

| | | |
|---|---|---|
| STATE OF OHIO ex rel LAWRENCE S. HUFFMAN | : | |
| Plaintiff | : | CASE NO. 72 CIV 0326 |
| -vs- | : | |
| WILLIAM H. DAKOTA et al | : | JOURNAL ENTRY |
| Defendant | : | |

Upon sworn charges filed with the Clerk of Courts against Robert Smith alleging disobedience of the said Robert Smith to the former Order of this Court directing the non-exhibition of obscene motion picture films at the Cinema I Theater, #69 Public Square, Lima, Ohio, on motion of the plaintiff, a rule is allowed herein against the said Robert Smith directing him to appear before this Court on May 3, 1973, at 2:00 o'clock P.M., and to bring with him at such time the motion picture films "Just Married" "Back Door", and "Bob Dick" so that a determination might be made as to whether said films are obscene and upon such determination to require said Robert Smith to account for the box office receipts derived from the exhibition of said films and forfeit the same.

JUDGE

960131

T-6

CSB 19 — Barnett Brothers, Publishers, Springfield, Ohio

# Subpena Duces Tecum

CIVIL CASE

Journal Cook, Sec. [illegible]

The State of Ohio, Allen County, Common Pleas Court

To Robert Smith, c/o Cinera I, Lima, Ohio

Projectionist John Doe, c/o Cinera I, Lima, Ohio

You are hereby required to be and appear before the Common Pleas Court at the Court House in said County, on the 3 day of May A. D. 19 73 at 2:00 o'clock P M., to testify as a witness in a certain case pending in said Court, wherein State of Ohio, ex rel Lawrence S. Huffman Plaintiff, and William H. Dilotta, et al Defendant; and also that you bring with you and produce at the time and place aforesaid

the three motion picture films exhibited at the Cinera I Theater, 109 Public Square, Lima, Ohio, On May 1, 1973, and purportedly entitled "Just Married", "Back Door" and "Bob Dick"

and not depart the Court without leave. Herein fail not, under penalty of the law. And have you then and there this writ.

Said Court requires your said attendance on behalf of the

WITNESS my hand and the seal of said Court this day of 19 73

Clerk

By

Deputy

## Appendix U

*William H. Dakota et al v. State of Ohio, ex rel Lawrence S. Huffman,* C73-176, (being a Removal Action in The United States District Court for the Northern District of Ohio, Western Division)


| Papers Included in Appendix: | Page |
|---|---|
| Petition for Removal, filed May 3, 1973. . . . . | 3-8 |
| Notice of Removal, filed May 3, 1973. . . . . | 9 |
| Memorandum of Law on Effect of Removal of State Court Action, filed in Allen County Court on May 3, 1973. . . . . | 10-11 |
| Motion to Remand, filed May 14, 1973. . . . . | 12-13 |
| Memorandum in Support of Motion to Remand, filed May 14, 1973. . . . . | 14-22 |
| Motion for Immediate Hearing and Memorandum in Support Thereof (less App. Exhibits A-F). . . . . | 23-26 |
| Affidavit of Deputy Sheriff Fred Hawk re films "Back Door", "Just Married" and "Bob Dick" viewed on May 1, 1973 at Cinema I Theatre. . . . . | 27-28 |

U-3

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

STATE OF OHIO, ex rel
LAWRENCE S. HUFFMAN,

Respondent,

-versus-

WILLIAM H. DAKOTA, et al

Petitioners.

C 73-176

CIVIL ACTION

FILED
MAY 3 12 24 PM '73

PETITION FOR REMOVAL

TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION.

The Petition of WILLIAM H. DAKOTA, et al, including ROBERT SMITH and OTIS HATFIELD shows:

1.

An action was commenced against Petitioners in the Court of Common Pleas, Allen County, Ohio, entitled STATE OF OHIO, ex rel LAWRENCE S. HUFFMAN, Plaintiff, against WILLIAM H. DAKOTA, and FLORA MAY COLLINS MOOR, and LELAND SAMUEL COLLINS, SARA LEE COLLINS, and PUSSY CAT CORPORATION, and CINEMA I THEATRE and John DOES and Jane DOES, Defendants, by the service upon them of a Summons and Complaint and Amended Complaint. Further proceedings have been had therein, to wit: two evidentiary hearings which resulted in temporary and permanent injunctions closing Cinema I Theatre.

2.

The above-described action is a civil action which may be removed to this Court by the Petitioners, pursuant to

the provisions of 28 U.S.C. §1443, in that Petitioners cannot enforce, in the Courts of the State of Ohio, a right under the Free Speech and Press Provisions of the Constitution of the State of Ohio, in that

(a) Respondent, Plaintiff in the said State Court action, has brought a Petition to close said business, which is the dissemination of sexually explicit materials, which are presumptively protected under the First Amendment to the Constitution of the United States and the Free Speech and Press Provisions of the Constitution of the State of Ohio, to willing adults only, under controlled circumstances under which the materials are not thrust upon the sensibilities of persons unwilling to view them and without "pandering" in the Ginzburg sense;

(b) Said Complaint of Respondent was based on the allegation in the Respondent's Complaint that the CINEMA I THEATRE, at premises located at 69 Public Square, Lima, Ohio, was a "nuisance;"

(c) On April 20, 1972, this Honorable Court declared Ohio Revised Statutes §3767.06 unconstitutional and enjoined enforcement of same to close CINEMA I THEATRE;

(d) On or about May 1, 1973, Petitioner ROBERT SMITH was served with process directing him to appear in the Court of Common Pleas of Allen County, Ohio, and "bring with him at such time" three motion picture films "so that a determination might be made as to whether said films are obscene;"

(e) On or about May 1, 1973, Petitioner ROBERT SMITH was served with "JOHN DOE" process to appear in the Court of Common Pleas of Allen County, Ohio, the process being similar to that abovementioned.

3.

Said action is also removable pursuant to the provisions of 28 U.S.C. §1443, in that

(a) Petitioners cannot enforce, in the Courts of the State of Ohio, rights under the First, Fifth and Fourteenth Amendments to the Constitution of the United States;

(b) The Court of Common Pleas of Allen County has, in the recent past, and is still being utilized by the State of Ohio to curtail the exercise of First Amendment freedom as well as the right against self-incrimination guaranteed by the Fifth Amendment. The procedures employed by Respondent herein, acting by and through Prosecutor Lawrence S. Huffman of Allen County, will be upheld by the Supreme Court of Ohio, as decided within the past few days. (Exhibit "A")

4.

Petitioners show that they are alleged to have disseminated obscene materials, but Petitioners show further that there has been no final adjudication of a violation of the Ohio obscenity laws involving Petitioners.

5.

Petitioners show that local prejudices have been so inflamed by the Court's actions and actions and statements of the Prosecutor of Allen County, that it will be impossible for them to protect their First and Fifth Amendment rights in the Court of Common Pleas of Allen County.

6.

Said action is also removable pursuant to 28 U.S.C. §1441 (b) in that it is an action of which the District Courts

have original jurisdiction founded on a claim or right arising under the Constitution, treaties, or laws of the United States, in that

(a) The District Courts have jurisdiction under 28 U.S.C. §1343, to redress deprivation of the civil rights of Petitioners, to-wit, a denial of their rights under the First, Fifth, and Fourteenth Amendments to the Constitution of the United States;

(b) Petitioners re-allege their allegations in Paragraph 3(a) and 3(b) and Paragraphs 4 and 5, and incorporate them as Paragraph 6(b) hereof.

7.

Petitioners file herewith a bond with good and sufficient surety conditioned, as provided by 28 U.S.C. §1446 (d), that they will pay all costs and disbursements incurred by reason of the removal proceedings brought hereby, should it be determined that this action is not removable, or is improperly removed.

WHEREFORE, Petitioners pray that the action now pending against them in the Court of Common Pleas of Allen County, Docket Number 72 CIV-0326 be removed therefrom to this Court for the reasons set out hereinbefore.

Respectfully submitted,

TED IORIO, Esquire
435 South Hawley Street
Toledo, Ohio 43609
(419) 248-5351

GILBERT H. DEITCH, Esquire
Suite 2005, 100 Colony Square
1175 Peachtree Street, N. E.
Atlanta, Georgia 30361
(404) 892-8890

BY:

ATTORNEYS FOR PETITIONERS

STATE OF OHIO

COUNTY OF LUCAS

V_E_R_I_F_I_C_A_T_I_O_N

Personally appeared before me, the undersigned, TED IORIO, Attorney for Petitioners herein, and after first being duly sworn, deposes and says that the facts alleged in the above and foregoing Petition for Removal are true and correct, to the best of his current knowledge, information, and belief.

TED IORIO

SOWRN TO AND SUBSCRIBED before me, this 21 day of May, 1973.

NOTARY PUBLIC

JACQUELINE A. WIGGS
Notary Public, State of Ohio
My Commission Expires Feb. 10, 1978

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on the 21 day of May, 1973, a true and exact copy of the foregoing was served upon Lawrence S. Huffman, Allen County Courthouse, Lima, Ohio.

J. C. Dan

5/3/73 pa 4-6 U-9

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

State of Ohio, ex rel Lawrence S. Huffman,

Respondent,

-vs-

William H. Dakota, et al.,

Petitioners.

Civil Action No.

NOTICE OF REMOVAL

C 73-176

To: Robert P. Dunlap
Clerk of Courts
Allen County Court House
Lima, Ohio

To: Lawrence S. Huffman
Prosecuting Attorney
127 N. Prospect Street
Lima, Ohio, 45802

You, and each of you, are hereby notified that on the 3rd day of May, 1973, William H. Dakota, et al., filed in the District Court for the Northern District of Ohio, Western Division, a Petition for Removal of Cause No. 72-Civ-0326, in the Court of Common Pleas of Allen County and entitled State of Ohio, ex rel Lawrence S. Huffman, Plaintiff, vs. William H. Dakota, et al., Defendants.

Ted Iorio

Dated this 3rd day of May, 1973.

STATE OF OHIO )
: ss.
LUCAS COUNTY )

I, Ted Iorio, being first duly sworn, say that the foregoing notice and copy of petition for removal have been hand delivered to Robert P. Dunlap, Clerk of Courts, Allen County Court House, Lima, Ohio, and Lawrence S. Huffman, Prosecuting Attorney, 127 N. Prospect Street, Lima, Ohio, this 3rd day of May, 1973.

Ted Iorio

Sworn to before me and subscribed in my presence this 3rd day of May, 1973.

Notary Public
My Commission expires

IN THE COURT OF COMMON PLEAS OF
ALLEN COUNTY, OHIO

STATE OF OHIO, ex rel :
LAWRENCE S. HUFFMAN, :
Plaintiff, :
v. :
WILLIAM H. DAKOTA, et al :
Defendant. :

C 73-176

CASE NO. 72 CIV-0326

FILED
JAN 11 '73

MEMORANDUM OF LAW ON EFFECT
OF REMOVAL ON STATE COURT ACTION

It is brought to the Court's attention that the above styled action has been removed to the United States District Court for the Northern District of Ohio, Western Division. This memorandum is intended to show the effect of said removal upon the above styled action.

The filing of a petition for removal under the statutes governing the procedures for removal effects an automatic removal from State Court to Federal District Court, and such removal stops any further proceeding in State Court pending the District Court's action. 28 U.S.C. §1446(e).

Compliance with the form and procedure of removal under 28 U.S.C. §1446 is all that is necessary to effect automatic removal from the State Court to the District Court. Baltimore & Ohio Railroad Company v. Koontz, 104 U.S. 5, 14, 26 L.Ed. 643 (1881); Flowers v. Aetna Casualty and Surety Company, 163 F. 2d 411, 415 (C.A. 6, 1967); Lowe v. Jacobs, 243 F. 2d 432 (C.A. 5, 1957); Southern Pacific Company v. Haigt, 126 F. 2d 900 (C.A. 9, 1942).

JANUARY-3 PM 1:58

The removal ends the power of the State Court to issue process because the entire case has been removed. Allman v. Hanley, 302 F. 2d 559 (C.A. 5, 1962). See also Adair Pipeline Company v. Pipeliners Local Union No. 798, 203 F. Supp. 434 (D.C. Texas 1962), aff'd 325 F. 2d 206 (C.A. 5, 1962), wherein it was held that presentation to the Judge of a State Court, in open court, at hearing on the plaintiff's motion for temporary injunction, of a copy of a petition to remove the case to Federal Court, which the Judge was obligated to turn over to the Clerk of the State Court, regardless of whether he actually did so, was sufficient compliance by defendants' attorney with statutory requirement that copy of petition for removal must be promptly filed with the Clerk of the State Court and the Judge of the State Court was put on notice that the case had been removed and that he could proceed no further therein.' (Emphasis supplied.)

After compliance with the removal statute, the State Court is deprived of jurisdiction to proceed with any phase of the litigation. Any issues as to the propriety of removal are Federal questions which must be decided in Federal Court. Lowe v. Jacobs, 243 F. 2d 432 (C.A. 5, 1957).

For the above reasons, defendants having complied with the removal statute, it is respectfully suggested that this Court no longer has any jurisdiction in this matter and is without power to proceed further.

435 S. Hawley Street
Toledo, Ohio 43609
(419) 248-5351

TED IORIO, Esquire

Suite 2005
1175 Peachtree St., N.E.
Atlanta, Georgia
(404)892-8890

GILBERT H. DEITCH, Esquire

ATTORNEYS FOR DEFENDANTS

FILED
MAR 14 3 00 PM '73

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

STATE OF OHIO, ex rel
LAWRENCE S. HUFFMAN

Respondent

-vs-

WILLIAM H. DAKOTA, et al

Petitioners

CASE NO. C 73-176

MOTION TO REMAND

Judge Lynch

Respondent respectfully moves the Court for an order remanding this cause to the Court of Common Pleas of Allen County, Ohio, on the ground that the cause was improperly removed and is not within the jurisdiction of this Court for the following reasons:

1. This action is not a civil rights case within 28 U.S. C. Section 1443; and

2. This action is not a case within 28 U.S.C. Section 1343; and

3. This action is barred under the doctrine of res judicata; and

4. Petitioners can effectively and adequately enforce their First Amendment rights to freedom of speech in the state court action.

Respondent further moves the Court for an order directing petitioners to pay to respondent all expenses and disbursements incurred by respondent by reason of the removal proceedings.

Gary R. Herrion
Assistant Prosecuting Attorney
127-129 North Pierce Street
P. O. Box 546, Lima, Ohio 45802
Telephone: (419) 229-0766
ATTORNEY FOR RESPONDENT

PROOF OF SERVICE

I hereby certify that a copy of the foregoing Motion to Remand was sent to attorney for Petitioners, Ted Iorio, 435 South Hawley

Street, Toledo, Ohio, on this ____ day of May, 1973, by regular U. S. Mail.

_____

FILED
APR 14 3 03 PM '73
U.S. DISTRICT COURT
N.D. OF OHIO

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

| | | |
|---|---|---|
| THE STATE OF OHIO, ex rel LAWRENCE S. HUFFMAN<br>Respondent | : | CASE NO. C 73-176 |
| -vs- | : | MEMORANDUM IN SUPPORT OF MOTION TO REMAND. |
| WILLIAM H. DAKOTA, et al<br>Petitioners | : | |

... ... ... ... ... ... ... ... ... ... ... ... ... ... ... ...

This Federal District Court lacks subject matter jurisdiction as this action is not a civil rights case within 28 U.S.C., Section 1443.

In their petition, William H. Dakota, et al, hereinafter referred to as defendants, have alleged that this United States District Court has jurisdiction over the case at hand. The defendants contend that this is a type of civil action of which the district courts of the United States have original jurisdiction under 28 U.S.C., Section 1443 (Civil Rights) and which may be removed to a federal district court pursuant to 28 U.S.C., Section 1441 (8).

With regard to the defendants' contention that 28 U.S.C., Section 1443 gives this Federal District Court jurisdiction, it is respectfully submitted that the well reasoned opinion and decision in State of Ohio, ex rel Robert J. Anderson v. A Motion Picture Film Entitled "Together" et al, in Case #C 72-28 in this United States District Court for the Northern District of Ohio, Western Division, is dispositive of such contention. A copy of said opinion and order is attached hereto, marked Exhibit A and incorporated herein by reference.

Defendants allege that plaintiff, State of Ohio, ex rel Lawrence S. Huffman, has conspired to intimidate and harass the defendants from exhibiting such films as the local exhibitors choose. They contend

that in furtherance of this conspiracy plaintiff has instituted numerous actions similar to the instant case under authority of a state statutory scheme allowing individuals to act in the place of the state attorney general or prosecutor in enforcing the public nuisance laws. Because the film owners' or exhibitors' first amendment rights to free speech were not found to prevail in any of the cases prior to removal to this Federal District Court, defendants argue that they cannot enforce their first amendment rights as citizens of the United States to freedom of speech and of the press in the Court of Common Pleas of Allen County, Ohio, and that, therefore, they are entitled to call upon the jurisdiction of this federal court for a final adjudication of the matter, pursuant to 28 U.S.C. Section 1443.

As the following analysis will show, this Federal Court lacks jurisdiction over the subject matter because this action is not a civil rights case within the meaning of 28 U.S.C. 1443, and removal of such case was therefore not proper.

In providing for the removal of certain civil rights cases, Section 1443 reads as follows:

> "Any of the following civil acts or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and diversion embracing the place wherein it is pending:
>
> "1. Against any person who is denied or cannot enforce in the courts of such state a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;
>
> "2. For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law." (Emphasis added)

A simple reading of this section reveals that the Court of Appeals for the Fourth Circuit was correct in describing the language of this section as "exquisite obscurity." See Baines v. Denville, 357 F. 2d 756 (4th Circ., 1966).

The scope of the civil rights removal statute, 28 U.S.C.

Section 1443, was considered and construed, by the United States Supreme Court, in Georgia v. Rachel, 384 U.S. 780 (1966) and its companion case of Greenwood v. Peacock, 384 U.S. 808 (1966).

On review, the Supreme Court in Rachel construed Section 1443 (1) as requiring a showing of two elements to permit removal:

1. That the right . . . is a right under any law providing for . . . equal civil rights, and

2. That the petitioner is denied or cannot enforce that right in the state courts.

The court also said that the first element must be construed to mean any law providing for specific civil rights stated in terms of racial equality. See Evanston v. Buick, 421 F. 2d 595 (7th Circ. 1970).

In writing for a majority of the Supreme Court in Rachel, Mr. Justice Stewart said, at pages 791-792:

> ". . . we conclude, therefore, that the model for the phrase 'any law providing for . . . equal civil rights' in Section 641 was the Civil Rights Act of 1866.
>
> "The legislative history of the 1866 Act clearly indicates that Congress intended to protect a limited category of rights, specifically defined in terms of racial equality. . .
>
> "On the basis of the historical material that is available, we conclude that the phrase 'any law providing for . . . equal civil rights' must be construed to mean any law providing for specific civil rights stated in terms of racial equality. Thus, the defendants' broad contentions under the First Amendment and the Due Process Clause of the Fourteenth Amendment cannot support a valid claim for removal under Section 1443, because the guarantees of those clauses are phrased in terms of general application available to all persons or citizens, rather than in the specific language of racial equality that Section 1443 demands. As the Court of Appeals for the Second Circuit has concluded, Section 1443 'applies only to rights that are granted in terms of equality and not to the whole gamut of constitutional rights . . .' 'When the removal statute speaks of "any law providing for equal rights," it refers to those laws that are couched in terms of equality, such as the historic and the recent equal rights statutes, as distinguished from laws of which the due process clause and 42 U.S.C. Section 1983 are sufficient examples, that confer equal rights in the sense, vital to our way of life, of bestowing them upon all." (Citation omitted). (Emphasis added).

Thus, the test for removal pursuant to 28 U.S.C. Section 1443(1)

under Rachel is whether a petitioner is denied or cannot enforce in a state court a right given by a federal statute providing for a specific civil right in terms of racial equality.

In the companion case of Greenwood v. Peacock, 384 U.S. 808 (1966), the Supreme Court held that Section 1443 (1) operated only where a state law rendered it impossible for defendants to enforce their civil rights in State courts or where the mere prosecution violated a federal equal rights law, and that Section 1443 (2) confers the privilege of removal only on federal officers or agents and those authorized to act with or for them in affirmatively executing duties under federal law providing for equal civil rights. In all other cases the state courts should have a chance to enforce the defendants' rights, no matter how their rights had been denied by State administrative officials in advance of the trial.

In addition, the Supreme Court in Peacock specifically held that "the first amendment rights of free expression . . . so heavily relied upon in the removal petitions, are not rights arising under a law providing for 'equal civil rights' within the meaning of Section 1443 (1), and that the reference in Section 1443(1) . . . to 'equal civil rights' . . . does not include the broad constitutional guarantees of the first amendment."

From Peacock, it is obvious that defendants are not within the purview of Section 1443(2), and this subsection will therefore be disregarded for further purposes of this brief.

The net result of the Georgia v. Rachel, Greenwood v. Peacock dialogue is to establish, as a prerequisite to removal of a pending civil action or criminal prosecution under 28 U.S.C. Section 1443(1), the necessity of showing that a defendant is being denied or cannot enforce rights guaranteed under a federal law "providing for specific civil rights stated in terms of racial equality." As stated in the case of South Carolina v. Moore, 447 F. 2d 1067, 1070 (4th Cir. 1971):

"The defendant must show that there is a basis for a

> firm prediction that such rights will be denied in the State court or that the pendency of the prosecution without more, is a deprivation of such a federally protected right . . . he must show that his federally secured right of racial equality is denied by the pendency of the proceeding or by reason of the operation of a pervasive and explicit state or federal law that those rights will inevitably be denied by the very act of bringing the defendant to trial in the state court."

Applying the reasoning of Rachel and Peacock to the present case, it is obvious that this action is not a civil rights case within 28 U.S.C. Section 1443(1). The sole ground cited by the defendants in their petition for removal of this case, pursuant to 28 U.S.C. Section 1443(1) was that they cannot enforce in the Court of Common Pleas of Allen County, Ohio, their first amendment rights as citizens of the United States to freedom of speech. However, as the Rachel and Peacock decisions make clear, defendants' broad contention that they cannot enforce their first amendment rights to freedom of speech in the State court cannot support a valid claim for removal and jurisdiction under Section 1443(1), because the guarantees of the First Amendment are phrased in terms of general application available to all persons or citizens, rather than in the specific language of racial equality that Section 1443(1) demands.

As stated, the only ground relied upon by defendants in their petition for removal of this case pursuant to 28 U.S.C. Section 1443(1) is that they cannot enforce their first amendment rights to freedom of speech in the state courts. Because their petition for removal failed to make any showing whatever that they are being denied or cannot enforce rights guaranteed under a federal law providing for specific equal civil rights stated in terms of racial equality, it is clear that under the holdings of the Rachel and Peacock cases defendants are not entitled to removal of this case pursuant to 28 U.S.C., Section 1443(1).

Finally, this court's well reasoned opinion (attached hereto and incorporated herein by reference) in State of Ohio ex rel Robert J. Anderson v. A Motion Picture Film Entitled "Together" et al, in Case No. C72-28,

is conclusively dispositive of the defendant's contention. In that case, it was held that:

> "Since First Amendment rights of free expression are not rights arising under a law providing for equal civil rights within the meaning of Section 1443(1) . . . the petitioners cannot support a valid claim herein for removal under 1443 by alleging denial of First Amendment rights."

The law therefore having been repeatedly and authoritatively so held, it is clear that the defendants' allegation of jurisdiction by means of 28 U.S.C. Section 1443(1) is totally and unequivocally without merit; and, because of the lack of subject matter jurisdiction, the cause should again be remanded to the state court.

An action to abate a public nuisance is not removable under 28 U.S.S. Section 1441.

Defendants also contend that 28 U.S.C. Section 1343 specifically creates the original jurisdiction of the federal district court, thus triggering the removal provisions of Section 1441(B), by stating in their petition for removal at paragraph 6(A) -- "The District Courts have jurisdiction under 28 U.S.C. Section 1343 to redress violations of the Civil Rights Act against Petitioners, to wit, a denial of their rights under the First, Fifth, and Fourteenth Amendments to the Constitution of the United States."

To paraphrase defendants' contention, they claim that enforcement of the Ohio Nuisance Statutes, Sections 3767.01 et seq., violates their constitutional right of free speech.

The State of Ohio respectfully submits that this Federal District Court lacks jurisdiction because the plaintiffs' action is one to abate a public nuisance; that it is the type of action as to which the Federal Court has neither original nor removal jurisdiction. See Grove Press, Inc., v. City of Philadelphia, 300 F. Supp. 281, at 292, and 28 U.S.C., Section 1441(B):

> ". . .The City derives its authority to seek an injunctio

injunction against this 'nuisance' not from Federal law, but rather from sovereign power delegated to it by the Commonwealth of Pennsylvania for the purpose of permitting it to protect the health of its citizens . . ."

And in Grove Press, Inc., case, the Court also stated at page 292 the following:

"Although it is likely that the alleged obscenity of 'I am Curious -- Yellow' will be the critical issue in the state court proceeding, this court nevertheless cannot conclude that removal to the federal court of this type of case either is contemplated by Title 28 U.S.C., Section 1441 or supported by the policy considerations relevant to the removal problem.

"The City's prayer for an injunction in the state court neither constitutes a request . . . for a remedy expressly granted by an Act of Congress . . . nor does it necessarily require the construction of a Congressional Act or federal common law. The City derives its authority to seek an injunction against this "nuisance" not from federal law, but rather from sovereign power delegated to it . . . to protect the health and welfare of its citizens.

"The Supreme Court has never indicated either that it is improper for states or municipalities to proscribe obscenity and prosecute those who sell and distribute obscene material, or that a state trial court or jury is unable to interpret and apply the appropriate constitutional standards. Significantly, the defendants have failed to cite any case removed solely on the basis that the defendants to the action planned to raise First Amendment defenses. Indeed, the only cited case which involves a factual situation similar to that involved here unequivocally holds that a plaintiff's anticipation of such defenses . . . would not mean that the cause of action alleged by plaintiff is founded on a claim or right arising under the Constitution . . . Levitt and Sons, Inc., v. Prince George County Cong. of Racial Eq. 221 F. Supp. 541, 544 (D Md., 1963) . . .

"Furthermore, the defendant s have failed to draw any distinction between this case and thousands of other cases, properly instituted and prosecuted in the state courts, where defendants intend to rely primarily upon federal constitutional defenses. Sustaining removal in Civil Action No. 69-934 would create a precedent for sustaining removal of all state cases where defendants arrested and charged with lesser misdemeanors planned to rely on Federal Constitutional defenses. State courts, of course, have the same obligation as federal courts to vindicate meritorious federal constitutional claims, and assuming that an allegation that they will not do so is relevant in support of any request for federal judicial intervention, of Dombroski, supra, it is not relevant for purposes removing an action here pursuant to Title 28 U.S.C., Section 1441."

In the instant case, the defendants are unable to show that their First Amendment rights have not, are not, or would not be protected in the state courts. Secondly, their mere allegation of a violation of First Amendment rights does not create the requisite controversy arising under the United States Constitution to grant this court jurisdiction over the matter. And finally, Chapter 3767 of the Ohio Revised Code has been unequivocally declared constitutional by this Court in Grove Press, Inc., v. Flask, 325 F. Supp, 574 (1970) under standards and utilizing procedures outlined by this Court in Pursue, Ltd. v. Lawrence S. Huffran, Case No. C72-432, more specifically, conducting a prior adversary hearing as to obscenity in an effort to enforce the state court injunction which prohibits the exhibition of obscene films at the subject nuisance premises.

Further, respondent contends that petitioners are barred under the doctrine of res judicata from bringing this action utilizing the same grounds for relief as that sought by the same petitioners by a similar action in this Court in Case No. 72-445 which was dismissed by this Court on April 26, 1973. See McLaughlin Bros. v. Hollowell, 228 U.S. 278, 33 S. Ct. 465; Whitcomb v. Smithson, 175 U.S. 635, 20 S. Ct. 248; St. Paul & C. R. Co. v. McLean, 108 U.S. 212, 2 S. Ct. 498.

On the aforementioned authorities the plaintiffs respectfully submit that removal of the case at hand was not only improper, but that there is still no federal jurisdiction pursuant to 28 U.S.C. Sections 1443 and 1441(B), and that the case should again be remanded to the state courts for its adjudication.

Respectfully submitted,

Gary R. Herron
Assistant Prosecuting Attorney
Allen County, Ohio
127-129 North Pierce Street
P. O. Box 548, Lima, Ohio 45802
Telephone: (419) 229-0786
ATTORNEY FOR RESPONDENT

PROOF OF SERVICE

I hereby certify that a copy of the foregoing Memorandum was mailed to attorney Ted Iorio, 435 South Hawley Street, Toledo, Ohio, this 7th day of May, 1973.

_____

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

STATE OF OHIO ex rel
LAWRENCE S. HUFFMAN

Respondent

-vs-

WILLIAM H. DAKOTA et al

Petitioners

CASE NO. C 73-176

MOTION FOR IMMEDIATE HEARING

.. .. .. .. .. .. .. .. .. .. .. .. .. .. .. .. .. .. .. .. .. ..

Respondent respectfully moves the Court pursuant to Rule 6(D) of the Federal Rules of Civil procedure for an immediate hearing on Respondent's Motion for Remand which is being filed herewith and for leave to serve a copy of his Motion for Remand and Notice of Hearing thereof within five (5) days of the time specified for the hearing.

Good cause exists for this Motion as is clearly set forth in the Memorandum in Support of this motion attached hereto and made a part hereof.

Respectfully submitted,

Gary R. Hermon
Assistant Prosecuting Attorney
Allen County, Ohio
127-129 North Pierce Street
P. O. Box 546, Lima, Ohio 45802
ATTORNEY FOR RESPONDENT

MEMORANDUM IN SUPPORT OF MOTION FOR IMMEDIATE HEARING ON MOTION FOR REMAND

This motion is being filed pursuant to Rule 6(D) of the Federal Rules of Civil Procedure which provides in material part as follows:

> "A written motion other than one which may be heard ex parte and notice of the hearing thereof shall be served not later than five (5) days before the time specified for the hearing unless a different period is fixed by these rules or by Order of the Court. Such an order for cause shown shall be made on ex parte application.

In September, 1972, respondent filed a complaint in equity in the Court of Common Pleas of Allen County, Ohio, seeking to enjoin the continuous exhibition of obscene motion picture films and to abate the same as a public nuisance in Allen County and in the State of Ohio. The Complaint was filed pursuant to Sections 3767.01 et seq., of the Ohio Revised Code. Respondent further applied for a preliminary injunction which application was heard by the Court of Common Pleas and after due deliberation, the Court did grant a preliminary injunction on October 24, 1972.

On November 30, 1972, the Common Pleas Court of Allen County, Ohio, issued a permanent injunction finding that a nuisance existed at #69 Public Square, Lima, Ohio, and permanently enjoined the exhibition of obscene motion picture films at said location.

On April 20, 1973, the Court in Pursue, Ltd. v. Lawrence S. Huffman, et al, Case No. 72-432, held those provisions of Chapter 3767 of the Ohio Revised Code which provided for the literal closure of a premises in which a nuisance has been maintained unconstitutional, and enjoined the defendants therein from executing ONLY that portion of the State court order which provided for closure. (See Exhibit A). The State court injunctions which prohibited the continuation, in effect, the perpetuation of the nuisance, to wit: the exhibition of obscene motion picture films, however, remained undisturbed by the federal court order. (See Exhibits B and C).

On April 26, 1973, this Court in State of Ohio ex rel Lawrence S. Huffman v. William H. Dakota et al, Case No. 72-445, dismissed sua sponte the pending removal action thereby returning such case to the jurisdiction of the Allen County, Ohio, Court of Common Pleas. (See Exhibit D).

On May 1, 1973, the plaintiff in the State case filed his verified Motion (See Exhibit E) in the State court requesting an adjudication as to obscenity of the motion picture films being exhibited at the

subject nuisance premises. The State Court ordered that such a hearing be conducted on May 3, 1973 (See Exhibit F). The Petition for Removal filed herein on May 3, 1973, forced the cancellation of the State court proceeding by virtue of its mere filing (whether meritorious or fraudulent) causing the termination of the State court's jurisdiction.

Respondent contends that petitioners are barred under the doctrine of res judicata from bringing a second Petition for Removal. It is elementary that a second petition for removal cannot be made on the same grounds as the first one as is the case here. (See McLaughlin Bros. v. Hallowell, 228 U.S. 278, 33 S. Ct. 465; Whitcomb v. Smithson, 175 U.S. 635, 20 S. Ct. 248; St. Paul & C.R. Co. v. McLean, 108 U.S. 212, 2 S. Ct. 498)

As respondent has argued in prior matters arising out of activities conducted at the subject nuisance premises which have resulted in actions before this Court, the petitioners are flagrantly abusing the federal judicial process urging federal court intervention while continuing their unlawful conduct by exhibiting the crudest imaginable hard core pornographic obscene motion picture films and reaping the profits of this unlawful undertaking by filing actions of the nature presently before the Court. In support of this contention respondent attacks hereto Exhibit G, an affidavit of a law enforcement officer describing the three motion pictures which were to be scrutinized by the State court prior to the filing of the Petition for Removal in this case.

Respondent further submits that this matter was awaiting a prior adversary hearing on the obscenity of motion picture films being exhibited at #69 Public Square, Lima, Ohio, time is of the essence, and the matter is pressing. Unless this Court orders an immediate hearing on respondent's motion to remand, respondent's rights to have the motion picture films being exhibited at #69 Public Square, Lima, Ohio, declared obscene and abated as a public nuisance will be substantially prejudiced and a great injustice will result.

Gary K. Hermon
Assistant Prosecuting Attorney

PROOF OF SERVICE

I hereby certify that a copy of the foregoing Motion for Immediate Hearing with attached Memorandum was mailed by regular U. S. Mail this _____ day of May, 1973, to Ted Iorio, 435 South Hawley Street, Toledo, Ohio 43609, attorney for Petitione[illegible].

_____

AFFIDAVIT

STATE OF OHIO
SS:
ALLEN COUNTY

FRED HAWK, being first duly sworn, says that he is a deputy sheriff for Allen County, Ohio, and that at approximately 12:30 p.m., on May 1, 1973, affiant did pay the sum of $3.00 and thereby was admitted to the Cinema I Theater, #69 Public Square, Lima, Ohio.

Affiant says that the marquee of said theater advertised the following titled motion pictures, "Back Door", "Just Married", and "Bob Dick".

Affiant says that he did see three motion picture flims while at the said Cinema I Theater and that the first film he observed had no introduction as to title, producer, actors or other identifiable features. The plot of the first movie apparently entitled "Back Door" revolved about three neighborhood couples who exchanged partners for various sexual acts. Depicted upon the screen during said film were nude males and females performing acts of sexual intercourse, fellatio and cunnilingus. Affiant says that all of said sexual acts were depicted as explicit as such acts can be depicted in that the camera would focus in upon the actual sexual act in question and further, that all of said sexual acts as depicted upon the screen were not simulated, but actually performed. The male penis was observed in a state of erection and actual penetration could be seen of the female vagina. Affiant says that said film contained a segment in which the female inserted in her mouth an erect male penis and clearly depicted on the screen was semen coming

from the said male penis and being licked by the said female.

Affiant says that the next motion picture which he saw on said date had no introduction or other identifiable feature, however, it is assumed by the affiant to be the motion picture film entitled "Bob Dick". The film was about a hillbilly couple who agreed to, for a substantial sum of money, appear in a pornographic movie. The film contained solely various scenes of nude males and females performing sexual intercourse, fellatio, and cunnilingus, all of which were performed as explicity as above described in the prior motion picture.

Affiant says that the third motion picture was apparently entitled "Just Married" although no introduction to the movie was depicted on the screen. Affiant says that the plot of said motion picture film was about a man and woman just married who are instructed by another couple on sex.

Affiant says that the entire movie depicted upon the screen nude males and females performing actual intercourse, fellatio, and cunnilingus. Affiant says that all of said sexual acts were actual and non-simulated and that the camera, as in the other two motion picture films, would constantly focus in upon the genitalia of the parties engaged in such sexual acts.

Further affiant saith not.

_____

Sworn to before me and subscribed in my presence, this _____ day of May, 1973.

_____

FILED
MAY 22 3 55 PM '73

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

| | | |
|---|---|---|
| State of Ohio, | ) | |
| | ) | |
| Plaintiff, | ) | Civil No. C 73-176 |
| | ) | |
| vs. | ) | |
| | ) | |
| William H. Dakota, | ) | O R D E R |
| | ) | |
| Defendant. | ) | |

This cause came to be heard upon motion of the plaintiff for an immediate hearing on its motion to remand this action to the Court of Common Pleas of Allen County, Ohio. For good cause appearing, it is

ORDERED that the motion of the plaintiff should be and hereby is overruled.

United States District Judge

In conformity with Rule 77 (d) F.R.C.P. please take notice that the following order of judgment was entered in this court on MAY 22 1973

Dominic J. Cimino, Clerk

Toledo, Ohio.

# Appendix V

*State of Ohio v. Robert Smith*, 73 CR 093
(Being a Criminal Case filed on May 4, 1973
in the Court of Common Pleas of Allen County,
Ohio)


| Papers Included in Appendix: | Page |
|---|---|
| Affidavit of Lawrence S. Huffman, filed May 4, 1973 | 3 |
| Motion for Prior Adversary Hearing, filed May 4, 1973 | 4 |
| Affidavit of Deputy Sheriff Fred Hawk re films "Back Door", "Just Married" and "Bob Dick" | 5-6 |
| Journal Entry filed May 4, 1973 | 7 |
| Summons for Robert Smith, filed May 4, 1973 | 8-9 |
| Supena Duces Tecum Re films "Back Door" "Just Married" and "Bob Dick", filed May 4, 1973 | 10 |

V-3

IN THE COURT OF COMMON PLEAS OF ALLEN COUNTY, OHIO

| | | |
|---|---|---|
| THE STATE OF OHIO | : | |
| Plaintiff | : | CASE NO. 73 CR 093 |
| -vs- | : | |
| | : | AFFIDAVIT |
| ROBERT SMITH | : | |
| Defendant | : | |
| | : | |

.. .. .. .. .. .. .. .. .. .. .. .. .. .. .. .. .. .. ..

STATE OF OHIO
SS:
ALLEN COUNTY

Now comes LAWRENCE S. HUFFMAN, the duly elected and qualified Prosecuting Attorney of Allen County, Ohio, who being duly sworn according to law, deposes and says that on or about the 1st day of May, 1973, at the County of Allen aforesaid, one Robert Smith with knowledge of the contents and character of the obscene material did knowingly exhibit obscene material to wit: three motion picture films purportedly entitled "Back Door", "Just Married" and"Bob Dick", contrary to Section 2905.35 of the Ohio Revised Code and against the peace and dignity of the State of Ohio.

_____

Sworn to before me and subscribed in my presence, this _____ day of May, 1973.

_____
Deputy Clerk of Common Pleas Court. Notary Public

IN THE COURT OF COMMON PLEAS OF ALLEN COUNTY, OHIO

| | | |
|---|---|---|
| THE STATE OF OHIO | : | |
| Plaintiff | : | CASE NO. 73 CR 083 |
| -vs- | : | |
| ROBERT SMITH | : | MOTION FOR PRIOR ADVERSARY HEARING |
| Defendant | : | |
| | : | |

.. .. .. .. .. .. .. .. .. .. .. .. .. .. .. .. .. .. .. .. ..

Now comes the State of Ohio and moves the Court for an Order setting a hearing date certain for the purpose of conducting a prior adversary hearing as to the obscenity of the motion picture films exhibited at the Cinema I Theater, #69 Public Square, Lima, Ohio, on May 1, 1973, and purportedly entitled "Back Door", "Just Married" and "Bob Dick".

The State of Ohio further moves that the Court determine at such hearing whether or not said motion picture films are obscene and that upon a judicial determination that said motion picture films are obscene, the Court retain custody of said motion picture films until the trial of this cause.

In support of said motion, the State of Ohio attaches hereto and incorporates by reference an affidavit which is marked Exhibit A.

Respectfully submitted,

Gary R. Herron
Assistant Prosecuting Attorney
Allen County, Ohio
ATTORNEY FOR STATE OF OHIO

**AFFIDAVIT**

STATE OF OHIO
SS:
ALLEN COUNTY

FRED HAWK, being first duly sworn, says that he is a deputy sheriff for Allen County, Ohio, and that at approximately 12:30 p.m., on May 1, 1973, affiant did pay the sum of $3.00 and thereby was admitted to the Cinema I Theater, #69 Public Square, Lima, Ohio.

Affiant says that the marquee of said theater advertised the following titled motion pictures, "Back Door", "Just Married", and "Bob Dick".

Affiant says that he did see three motion picture films while at the said Cinema I Theater and that the first film he observed had no introduction as to title, producer, actors or other identifiable features. The plot of the first movie apparently entitled "Back Door" revolved about three neighborhood couples who exchanged partners for various sexual acts. Depicted upon the screen during said film were nude males and females performing acts of sexual intercourse, fellatio and cunnilingus. Affiant says that all of said sexual acts were depicted as explicit as such acts can be depicted in that the camera would focus in upon the actual sexual act in question and further, that all of said sexual acts as depicted upon the screen were not simulated, but actually performed. The male penis was observed in a state of erection and actual penetration could be seen of the female vagina. Affiant says that said film contained a segment in which the famale inserted in her mouth an erect male penis and clearly depicted on the screen was semen coming

from the said male penis and being licked by the said female.

Affiant says that the next motion picture which he saw on said date had no introduction or other identifiable feature, however, it is assumed by the affiant to be the motion picture film entitled "Bob Dick". The film was about a hillbilly couple who agreed to, for a substantial sum of money, appear in a pornographic movie. The film contained solely various scenes of nude males and females performing sexual intercourse, fellatio, and cunnilingus, all of which were perforced as explicity as above described in the prior motion picture.

Affiant says that the third motion picture was apparently entitled "Just Married" although no introduction to the movie was depicted on the screen. Affiant says that the plot of said motion picture film was about a man and woman just married who are instructed by another couple on sex.

Affiant says that the entire movie depicted upon the screen nude males and females performing actual intercourse, fellatio, and cunnilingus. Affiant says that all of said sexual acts were actual and non-simulated and that the camera, as in the other two motion picture films, would constantly focus in upon the genitalia of the parties engaged in such sexual acts.

Further affiant saith not.

_____

Sworn to before me and subscribed in my presence, this _____ day of May, 1973.

_____

IN THE COURT OF COMMON PLEAS OF ALLEN COUNTY, OHIO

THE STATE OF OHIO :
Plaintiff :
-vs- :
ROBERT SMITH :
Defendant :
:

CASE NO. 73 CR 059

JOURNAL ENTRY

This matter came on to be heard upon the Motion of the State of Ohio for a prior adversary hearing.

The Court finds after due consideration of said motion together with the affidavit attached thereto that said motion is well taken, and accordingly,

IT IS ORDERED that a prior adversary hearing as to the obscenity of the motion picture films purportedly entitled "Back Door", "Just Married", and "Bob Dick", be conducted at Courtroom # 2, before one of the Honorable Judges of the Common Pleas Court, on May 7, 1973, at 1:30 P.M.

Robert M. Kopp
JUDGE

STATE OF OHIO )
) SS
Allen County )

CERTIFICATE OF COPY

I, ROBERT M. KOPP, Clerk of the Court of Common Pleas within and for said County and State aforesaid, do hereby certify that the foregoing is a true copy of the original Journal Entry in the case of State of Ohio vs. Robert Smith, as the same remains on file in my office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court this 4th day of May, 1973.

(SEAL)

ROBERT M. KOPP, Clerk
By: Deputy

IN THE COURT OF COMMON PLEAS OF ALLEN COUNTY, OHIO

THE STATE OF OHIO :
Plaintiff : CASE NO 73 CR 097
-vs- :
ROBERT SMITH : SUMMONS
Defendant :

TO THE SHERIFF OF ALLEN COUNTY, OHIO:

You are hereby commanded to notify Robert Smith that he has had an affidavit filed against him by Lawrence S. Huffman in the Common Pleas Court of Allen County, Ohio, as follows:

State of Ohio, Allen County, SS:

Now comes Lawrence S. Huffman, the duly elected and qualified Prosecuting Attorney of Allen County, Ohio, who being duly sworn according to law, deposes and says that on or about the 1st day of May, 1973, at the County of Allen aforesaid, one Robert Smith with knowledge of the contents and character of the obscene material did knowingly exhibit obscene material to wit: three motion picture films purportedly entitled "Back Door", "Just Married" and "Bob Dick", contrary to Section 2905.35 of the Ohio Revised Code and against the peace and dignity of the State of Ohio.

S/ Lawrence S. Huffman

Sworn to and subscribed before me this 4 day of May, 1973.

S/ Connie R Herman
~~Clerk of the Common Pleas Court~~ Notary Public

Robert Smith must appear in Common Pleas Court on May 7.

1973, at 1:30 P.M., in Courtroom # 2 before one of the Honorable Judges to answer to said affidavit.

Clerk, Common Pleas Court

By_____
Deputy Clerk

I certify this to be a true copy of the original summons with all endorsements thereon.

_____

By_____

RETURN

Sheriff's Office, Lima, Ohio, _____, 1973.

Received this writ _____, 1973, and on _____, 1973, I served the same on the defendant by leaving a certified copy thereof, with the endorsements thereon _____

_____.

_____.

EDWARD L. FAIR, SHERIFF

By_____
Deputy Sheriff

Ch. 18 BAUMETT BROTHERS, PUBLISHERS, SPRINGFIELD, OHIO

# Subpena Duces Tecum

CRIMINAL
~~XXXXX~~ CASE R.C. 2317.13; 2935.22

Revised Code Sec. 2317.11 13, 2305.07, 311.17

The State of Ohio, Allen County. Common Pleas Court

*To* Robert Smith, c/o Cinema I Theater, #69 Public Square, Lima, Ohio

Otis Hatfield, c/o Cinema I Theater, #69 Public Square, Lima, Ohio

*You are hereby required to be and appear before the Common Pleas Court at the Court House in said County, on the* day of May *A. D. 19* 73, *at* o'clock M., *to testify as a witness in a certain case pending in said Court, wherein* The State of Ohio *Plaintiff*, *and* Robert Smith *Defendant*; *and also that you bring with you and produce at the time and place aforesaid*

three motion picture films purportedly entitled "Back Door"
"Just Married" and "Bob Dick" exhibited at the Cinema I Theater
#69 Public Square, Lima, Ohio

*and not depart the Court without leave. Herein fail not, under penalty of the law. And have you then and there this writ.*

*Said Court requires your said attendance on behalf of the* State of Ohio
*WITNESS my hand and the seal of said Court.*

*this* 11th *day of* May *19* 73

Robert H. Hinkle
Clerk

*By* Donald E. Wilson
Deputy

# Appendix W

*Robert Smith v. State of Ohio*, C73-180,
(being a Removal Action in the United
States District Court for the Northern
District of Ohio, Western Division)


| Papers Included in Appendix: | Page |
|---|---|
| Petition for Removal, filed May 7, 1973, (Less Exhibits A-6) | 3-6 |
| Notice of Removal, filed May 7, 1973 | 7 |
| Memorandum of Law on Effect of Removal on State Court Action, filed with Allen County Common Pleas Court on May 7, 1973 | 8-9 |
| Motion to Remand, filed May 14, 1973 | 10 |
| Memorandum in Support of Motion to Remand, filed May 14, 1973 | 11-17 |
| Motion for Immediate Hearing, and Memorandum in Support Thereof, filed May 14, 1973 | 18-20 |

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

| | | |
|---|---|---|
| THE STATE OF OHIO | * | CASE NO. 73CR 093 |
| Plaintiff | * | |
| | * | |
| vs | * | |
| ROBERT SMITH | * | |
| Defendant | * | |

PETITION FOR REMOVAL

TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION.

The Petition of ROBERT SMITH shows:

1.

On or about May 4, 1973, an affidavit was filed in the Court of Common Pleas of Allen County, Ohio, in an action entitled THE STATE OF OHIO VS. ROBERT SMITH, Case No. 73CR 093, the affiant being LAWRENCE S. HUFFMAN, Prosecuting Attorney of Allen County, Ohio. (Affidavit attached hereto as Exhibit A)

2.

The affidavit of the aforesaid alleges that the defendant, ROBERT SMITH, did on or about May 1, 1973, exhibit three motion picture films knowing the same to be obscene in violation of Ohio Revised Code, Section 2905.35.

3.

Petitioner was served with a summons to notify him of the above-mentioned allegation and commanding him to appear in the

Court of Common Pleas of Allen County, Ohio, on May 7, 1973, to answer said affidavit. (Summons attached hereto as Exhibit B)

4.

Gary R. Hermon, Assistant Prosecuting Attorney, Allen County, Ohio, filed a Motion For Prior Adversary Hearing to determine whether the three motion picture films are obscene, with an affidavit in support of his motion. (Motion For Prior Adversary Hearing and Affidavit attached hereto as Exhibit C)

5.

Petitioner, ROBERT SMITH, was served with a subpoena duces tecum to appear as a witness in the case against himself and was further directed to "bring with you and produce at the time and place aforesaid three motion picture films purportedly entitled 'Back Door', 'Just Married', and 'Bob Dick' exhibited at the Cinema I Theater #69 Public Square, Lima, Ohio" (Subpoena Duces Tecum attached hereto as Exhibit D)

6.

The above-described action is a criminal action which may be removed to this Court by the Petitioner, pursuant to the provisions of 28 U.S.C. §1443, in that Petitioner cannot enforce, in the Courts of the State of Ohio, rights guaranteed him under the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States.

7.

Said action is removable specifically because the procedure employed by respondent herein, acting by and through Prosecutor Lawrence S. Huffman and Gary R. Hermon of Allen County, will be held by the Supreme Court of Ohio, as so ruled most recently, upholding the Court of Appeals of Ohio which decided that an individual can be made to produce a motion picture film notwithstanding his Fourth and Fifth Amendment rights. (Exhibit E)

8.

Petitioner shows that local prejudices have been so inflamed by the Court's action as well as actions and statements of the prosecutor of Allen County, that it will be impossible for him to protect his Fourth and Fifth Amendment rights in the Court of Common Pleas of Allen County.

9.

Said action is also removable pursuant to 28 U.S.C. §1441 (b) in that it is an action of which the District Courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties, or laws of the United States, in that

(a) The District Courts have jurisdiction under 28 U.S.C. §1343, to redress deprivation of the civil rights of Petitioner, to-wit, a denial of his rights under the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States;

(b) Petitioner re-alleges his allegations in Paragraph 6 and 8, and incorporate them as Paragraph 9 (b) hereof.

10.

Petitioner files herewith a bond with good and sufficient surety conditioned, as provided by 28 U.S.C. §1446 (d), that they will pay all costs and disbursements incurred by reason of the removal proceedings brought hereby, should it be determined that this action is not removable, or is improperly removed.

WHEREFORE, Petitioner prays that the action now pending against him in the Court of Common Pleas of Allen County, Case No. 73CR 093 be removed therefrom to this Court for the reasons set out hereinbefore.

Respectufully submitted,

TED IORIO, Esquire
435 South Hawley Street
Toledo, Ohio 43609
(419) 248-5351

GILBERT H. DEITCH, Esquire
Suite 2005, 100 Colony Square
1175 Peachtree Street, N. E.
Atlanta, Georgia 30361

BY: Ted Iorio
ATTORNEYS FOR PETITIONER

STATE OF OHIO)
)SS:
COUNTY OF LUCAS)

VERIFICATION

Personally appeared before me, the undersigned, Ted Iorio, Attorney for Petitioner herein, and after first being duly sworn deposes and says that the facts alleged in the above and foregoing Petition for Removal are true and correct, to the best of his current knowledge, information and belief.

Ted Iorio

Sworn to and subscribed before me, this 7th day of May, 1973.

Jacqueline A. Wages
Notary Public

JACQUELINE A. WAGES
Notary Public, Lucas County, Ohio
My Commission Expires March 10, 1975

CERTIFICATION

This is to certify that on the 7th day of May, 1973, a true and exact copy of the foregoing was served upon Lawrence S. Huffman, Allen County Courthouse, Lima, Ohio.

Ted Iorio

W-7

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

State of Ohio )
Respondent )
-vs- )
Robert Smith )
Petitioner )
)

C 73-180
Civil Action No.

NOTICE OF REMOVAL

To: Robert H. Dunlap
Clerk of Courts
Allen County Court House
Lima, Ohio

To: Lawrence S. Huffman
Prosecuting Attorney
127 N. Prospect Street
Lima, Ohio 45802

You, and each of you, are hereby notified that on the 7th day of May, 1973, Robert Smith filed in the District Court for the Northern District of Ohio, Western Division, a Petition for Removal of Cause No. 73CR 092, in the Court of Common Pleas of Allen County and entitled The State of Ohio, Plaintiff v Robert Smith, Defendant.

Ted Iorio

Dated this 7th day of May, 1973.

STATE OF OHIO )
)SS:
COUNTY OF LUCAS)

I, Ted Iorio, being first duly sworn, say that the foregoing notice and copy of petition for removal have been hand delivered to Robert H. Dunlap, Clerk of Courts, Allen County Court House, Lima, Ohio, and Lawrence S. Huffman, Prosecuting Attorney, 127 N. Prospect Street, Lima, Ohio, this 7th day of May, 1973.

Ted Iorio

Sworn to before me and subscribed in my presence this 7th day of May, 1973.

Notary Public

JACQUELINE A. WALLS
Notary Public, State of Ohio
My Commission Expires

IN THE COURT OF COMMON PLEAS OF
ALLEN COUNTY, OHIO

STATE OF OHIO :

Plaintiff, :

v. :

ROBERT SMITH :

Defendant. :

CASE NO. 73 CR 093

MEMORANDUM OF LAW ON EFFECT
OF REMOVAL ON STATE COURT ACTION

It is brought to the Court's attention that the above styled action has been removed to the United States District Court for the Northern District of Ohio, Western Division. This memorandum is intended to show the effect of said removal upon the above styled action.

The filing of a petition for removal under the statutes governing the procedures for removal effects an automatic removal from State Court to Federal District Court, and such removal stops any further proceeding in State Court pending the District Court's action. 28 U.S.C. §1446(e).

Compliance with the form and procedure of removal under 28 U.S.C. §1446 is all that is necessary to effect automatic removal from the State Court to the District Court. Baltimore & Ohio Railroad Company v. Koontz, 104 U.S. 5, 14, 26 L.Ed. 643 (1881); Flowers v. Aetna Casualty and Surety Company, 163 F. 2d 411, 415 (C.A. 6, 1967); Lowe v. Jacobs, 243 F. 2d 432 (C.A. 5, 1957); Southern Pacific Company v. Haight, 126 F. 2d 900 (C.A. 9, 1942).

The removal ends the power of the State Court to issue process because the entire case has been removed. Allman v. Hanley, 302 F. 2d 559 (C.A. 5, 1962). See also Adair Pipeline Company v. Pipeliners Local Union No. 798, 203 F. Supp. 434 (D.C. Texas 1962), aff'd 325 F. 2d 206 (C.A. 5, 1962), wherein it was held that presentation to the Judge of a State Court, in open court, at hearing on the plaintiff's motion for temporary injunction, of a copy of a petition to remove the case to Federal Court, which the Judge was obligated to turn over to the Clerk of the State Court, regardless of whether he actually did so, was sufficient compliance by defendants' attorney with statutory requirement that copy of petition for removal must be promptly filed with the Clerk of the State Court and the Judge of the State Court was put on notice that the case had been removed and that he could proceed no further therein. (Emphasis supplied.)

After compliance with the removal statute, the State Court is deprived of jurisdiction to proceed with any phase of the litigation. Any issues as to the propriety of removal are Federal questions which must be decided in Federal Court. Lowe v. Jacobs, 243 F. 2d 432 (C.A. 5, 1957).

For the above reasons, defendants having complied with the removal statute, it is respectfully suggested that this Court no longer has any jurisdiction in this matter and is without power to proceed further.

435 S. Hawley Street
Toledo, Ohio 43609
(419) 248-5351

Suite 2005
1175 Peachtree St., N.E.
Atlanta, Georgia
(404)892-8890

TED IORIO, Esquire

GILBERT H. DEITCH, Esquire

ATTORNEYS FOR DEFENDANT

FILED
1973 MAY 9 PM 3:23
U.S. DISTRICT COURT
N.D. OHIO

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

| | | |
|---|---|---|
| STATE OF OHIO | : | |
| Plaintiff | : | CASE NO. C73-180 |
| -vs- | : | JUDGE DON J. YOUNG |
| ROBERT SMITH | : | MOTION TO REMAND |
| Defendant | : | |

Plaintiff respectfully moves the Court for an order remanding this cause to the Court of Common Pleas of Allen County, Ohio, on the ground that the cause was improperly removed and is not within the jurisdiction of this Court for the following reasons:

1. This action is not a civil rights case within 28 U.S.C. Section 1443; and

2. This action is not a civil action within 28 U.S.C. Section 1441(b); and

3. This action is not a civil action within 28 U.S.C. 1343.

4. Defendants can effectively and adequately enforce their First Amendment rights to freedom of speech inthe state court action.

Plaintiff further moves the Court for an order directing defendant to pay to plaintiff all expenses and disbursements incurred by plaintiff by reason of the removal proceedings.

Gary R. Hermon
Assistant Prosecuting Attorney
127-129 North Pierce Street
P. O. Box 546, Lima, Ohio 45802
Telephone: (419) 229-0786
ATTORNEY FOR PLAINTIFF

PROOF OF SERVICE

I hereby certify that a copy of the foregoing Motion to Remand was mailed by regular U. S. Mail this ____ day of May, 1973, to attorney for defendant, Ted Iorio, 435 South Hawley Street, Toledo, Ohio.

FILED
MAY 14 3 05 PM '73
U.S. DISTRICT COURT
N.D. DIST. OHIO

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

| | | |
|---|---|---|
| THE STATE OF OHIO | : | |
| Plaintiff | : | CASE NO. C73-180 |
| -vs- | : | JUDGE DON J. YOUNG |
| ROBERT SMITH | : | MEMORANDUM IN SUPPORT OF MOTION TO REMAND. |
| Defendant | : | |
| | : | |

.. .. .. .. .. .. .. .. .. .. .. .. .. .. .. .. .. .. .. .. .. ..

The State of Ohio contends that the Federal District Court lacks jurisdiction in that the bases for removal as set forth in defendant's petition for removal are insufficient.

In his petition, Robert Smith, hereinafter referred to as the defendant, has alleged that this United States District Court has jurisdiction of the case at hand. The defendant contends that this is an action which may be removed to a Federal District Court pursuant to Title 28, United States Code, Section 1441(b) and Title 28, United States Code, Section 1443.

Section 1441 describes actions removeable generally and specifically subsection (b) provides as follows:

> "Any civil (my emphasis) action of which the district courts have original jurisdiction founded on a claim or right arising under the constitution, treaties, or laws of the United States, shall be removeable without regard to the citizenship or residence of the parties."

The case which defendant seeks to remove herein is a criminal case. A criminal affidavit has been filed against the defendant charging him with exhibiting obscene motion picture films in contravention of Revised Code 2905.35, a criminal offense, conviction of which may result in fine and imprisonment. Therefore, the action which defendant attempts to remove is a criminal action and not a civil action as required by subsection (b) of section 1441.

The defendant further cites as authority for removal, Section 1443

of Title 28 of the United States Code contending that he cannot enforce in the courts of the State of Ohio rights guaranteed him under the 4th, 5th, and 14th amendments to the Constitution of the United States. While Section 1443 includes both civil actions and criminal prosecutions, the matter pending must be "against any person who is denied or cannot enforce in the courts of such state a right under any law providing for the equal civil rights (my emphasis) of citizens in the United States or for all persons within the jurisdiction thereof."

The scope of the civil rights removal statute, 28 U.S.C. Section 1443, was considered and construed by the United States Supreme Court in Georgia v. Rachel, 384 U.S. 780 (1966) and its companion case of Greenwood v. Peacock, 384 U.S. 808 (1966).

On review, the Supreme Court in Rachel construed Section 1443 (1) as requiring a showing of two elements to permit removal:

1. that the right . . . is a right under any law providing for . . . equal civil rights, and

2. that petitioner is denied or cannot enforce that right in the state courts.

The court also said that the first element must be construed to mean any law providing for specific civil rights stated in terms of racial equality. See Evanston v. Buick, 421 F. 2d 595 (7th Circ., 1970).

In writing for a majority of the Supreme Court in Rachel, Mr. Justice Stewart said, at pages 791-792:

> ". . . we conclude, therefore, that the model for the phrase 'any law providing for . . . equal civil rights' in Section 641 was the Civil Rights Act of 1866.
>
> "The legislative history of the 1866 Act clearly indicates that Congress intended to protect a limited category of rights, specifically defined in terms of racial equality . . .
>
> "On the basis of the historical material that is available, we conclude that the phrase 'any law providing for . . . equal civil rights' must be construed to mean any law providing for specific civil rights stated in terms of racial equality. Thus, the defendants' broad contentions under the First Amendment and the Due Process Clause of the Fourteenth Amendment cannot support a valid claim for removal under Section 1443.

because the guarantees of those clauses are phrased in terms of general application available to all persons or citizens, rather than in the specific language of racial equality that Section 1443 demands. As the Court of Appeals for the Second Circuit has concluded, Section 1443 'applies only to rights that are granted in terms of equality and not to the whole gamut of constitutional rights . . .' When the removal statute speaks of "any law providing for equal rights," it refers to those laws that are couched in terms of equality, such as the historic and the recent equal rights statutes, as distinguished from laws, of which the due process clause and 42 U.S.C. Section 1983 are sufficient examples, that confer equal rights inthe sense, vital to our way of life, of bestowing them upon all." (citation omitted). (Emphasis added).

Thus, the test for removal pursuant to 28 U.S.C. Section 1443 (1) under Rachel is whether a petitioner is denied or cannot enforce in a state court a right given by a federal statute providing for a specific civil right in terms of racial equality.

In the companion case of Greenwood v. Peacock, 384 U.S. 808 (1966) the Supreme Court held that Section 1443(1) operated only where a state law rendered it impossible for defendants to enforce their civil rights in State courts or where the mere prosecution violated a federal equal rights law, and that Section 1443(2) confers the privilege of removal only on federal officers or agents and those authorized to act with or for them in affirmatively executing duties under federal law providing for equal civil rights. In all other cases the state courts should have a chance to enforce the defendants' rights, no matter how their rights had been denied by State administrative officials in advance of the trial.

In addition, the Supreme Court in Peacock specifically held that "the First Amendment rights of free expression . . . so heavily relied upon in the removal petitions, are not rights arising under a law providing for 'equal civil rights' within the meaning of Section 1443(1), and that the reference in Section 1443(1) . . . to 'equal civil rights' . . . does not include the broad constitutional guarantees of the First Amendment."

From Peacock it is obvious that defendant is not within the purview of Section 1443(2), and this subsection will therefore be disregarded for further purposes of this brief.

The net result of the Georgia v. Rachel, Greenwood v. Peacock dialogue is to establish as a prerequisite to removal of a pending civil action or criminal prosecution under 28 U.S.C. Section 1443(1), the necessity of showing that a defendant is being denied or cannot enforce rights guaranteed under a federal law "providing for specific civil rights stated in terms of racial equality." As stated in the case of South Carolina v. Moore, 447 F. 2d 1067, 1070 (4th Circ. 1971):

> "The defendant must show that there is a basis for a firm prediction that such rights will be denied in the State court or that the pendency of the prosecution without more, is a deprivation of such a federally protected right . . . he must show that his federally secured right of racial equality is denied by the pendency of the proceeding or by reason of the operation of a pervasive and explicit state or federal law that those rights will inevitably be denied by the very act of bringing the defendant to trial in the state court."

Applying the reasoning of Rachel and Peacock to the present case, it is obvious that this action is not a civil rights case within 28 U.S.C. Section 1443 (1). The sole other ground cited by the defendant in his petition for removal of this case pursuant to 28 U.S.C. Section 1443(1) was that he cannot enforce in the Court of Common Pleas of Allen County, Ohio, his first amendment rights as a citizen of the United States to freedom of speech. However, as the Rachel and Peacock decisions make clear, defendant's broad contention that he cannot enforce his first amendment rights to freedom of speech in the State court cannot support a valid claim for removal and jurisdiction under Section 1443(1), because the guarantees of the First Amendment are phrased in terms of general application available to all persons or citizens, rather than in the specific language of racial equality that Section 1443(1) demands.

As stated, the only ground relied upon by defendant in his petition for removal of this case pursuant to 28 U.S.C. Section 1443(1) is that he cannot enforce his first amendment rights to freedom of speech in the state courts. Because his petition for removal failed to make any showing whatever that he is being denied or cannot enforce rights guaranteed under a federal law providing for specific equal civil rights stated in terms of

racial equality, it is clear that under the holdings of the Rachel and Peacock cases defendant is not entitled to removal of this case pursuant to 28 U.S.C. Section 1443(1).

Finally, this court's well reasoned opinion (attached hereto and incorporated herein by reference) in State of Ohio ex rel Robert J. Anderson v. A Motion Picture Film Entitled "Together" et al in Case No. C72-28, is conclusively dispositive of the defendant's contention. In that case, it was held that:

> "Since First Amendment rights of free expression are not rights arising under a law providing for equal civil rights within the meaning of Section 1443(1) . . . the petitioners cannot support a valid claim herein for removal under 1443 by alleging denial of First Amendment rights."

The law therefore having been repeatedly and authoritatively so held, it is clear that the defendant's allegation of jurisdiction by means of 28. U.S.C. Section 1443(1) is totally and unequivocally without merit; and, because of the lack of subject matter jurisdiction, the cause should again be remanded to the state court.

An action to abate a public nuisance is not removable under 28 U.S.C. Section 1441.

Defendant also contends that 28 U.S.C. Section 1343 specifically creates the original jurisdiction of the federal district court, thus triggering the removal provisions of Section 1441(B), by stating in his petition for removal at paragraph 6(A) -- "The District Courts have jurisdiction under 28 U.S.C. Section 1343 to redress violations of the Civil Rights Act against Petitioners, to wit, a denial of their rights under the First, Fifth, and Fourteenth Amendments to the Constitution of the United States."

To paraphrase defendant's contention, he claims that enforcement of the Ohio statute Section 2905.35 violates his constitutional right of free speech.

The State of Ohio respectfully submits that this Federal District

Court lacks jurisdiction because it is the type of action as to which the Federal Court has neither original nor removal jurisdiction. See Grove Press, Inc., v. City of Philadelphia, 300 F. Supp. 281, at 292, and 28 U.S.C. Section 1441(b).

In the Grove Press Inc. case, the Court stated at page 292 the following:

> "Although it is likely that the alleged obscenity of 'I am Curious, Yellow' will be the critical issue in the state court proceeding, this court nevertheless cannot conclude that removal to the federal court of this type of case either is contemplated by Title 28 U.S.C., Section 1441 or supported by the policy considerations relevant to the removal problem.
>
> "The City's prayer for an injunction in the state courts neither constitutes a request . . . for a remedy expressly granted by an Act of Congress . . . nor does it necessarily require the construction of a Congressional Act or federal common law. The City derives its authority to seek an injunction against this " "nuisance" not from federal law, but rather from sovereign power delegated to it . . . to protect the health and welfare of its citizens.
>
> "The Supreme Court has never indicated either that it is improper for states or municipalities to proscribe obscenity and prosecute those who sell and distribute obscene material, or that a state trial court or jury is unable to interpret and apply the appropriate constitutional standards. Significantly, the defendants have failed to cite any case removed solely on the basis that the defendants to the action planned to raise First Amendment defenses. Indeed, the only cited case which involves a factual situation similar to that involved here unequivocally holds that a plaintiff's anticipation of such defenses . . . would not mean that the cause of action alleged by plaintiff is founded on a claim or right arising under the Constitution . . . Levitt and Sons, Inc. v. Prince George County Com. of Racial Eq., 221 F. Supp 541, 544 (D Md., 1963) . . .
>
> "Furthermore, the defendants have failed to draw any distinction between this case and thousands of other cases, properly instituted and prosecuted in the state courts, where defendants intend to rely primarily upon federal constitutional defenses. Sustaining removal in Civil Action No. 69-934 would create a precedent for sustaining removal of all state cases where defendants arrested and charged with lesser misdemeanors planned to rely on federal Constitutional defenses. State courts, of course, have the same obligation as federal courts to vindicate meritorious federal constitutional claims, and assuming that an allegation that they will not do so is relevant in support of any request for federal judicial intervention, of Dombroski, supra, it is not relevant for purposes of removing an action here pursuant to Title 28 U.S.C. Section 1441."

In the instant case, the defendant is unable to show that his First Amendment Right has not, is not, or would not be protected in the state courts. Secondly, his mere allegation of a violation of First Amendment rights does not create the requisite controversy arising under the United States Constitution to grant this court jurisdiction over the matter.

On the aforementioned authorities the plaintiffs respectfully submit that removal of the case at hand was not only improper, but that there is still no federal jurisdiction pursuant to 28 U.S.C. Sections 1443 and 1441(B), and that the case should again be remanded to the state courts for its adjudication.

Respectfully submitted,

Gary R. Hermon
Assistant Prosecuting Attorney
Allen County, Ohio
127-129 North Pierce Street
P. O. Box 546, Lima, Ohio 45802
Telephone: (419) 229-0786
ATTORNEY FOR PLAINTIFF

PROOF OF SERVICE

I hereby certify that a copy of the foregoing Memorandum was mailed by regular U. S. Mail this _____ day of May, 1973, to attorney for defendant, Ted Iorio, 435 South Hawley Street, Toledo, Ohio.

FILED
MAY 14 5 05 PM '73
CLERK
U.S. DISTRICT COURT
NORTHERN DISTRICT
OF OHIO

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

| | | |
|---|---|---|
| STATE OF OHIO | : | |
| Plaintiff | : | CASE NO. 73-180 |
| -vs- | : | JUDGE DON J. YOUNG |
| ROBERT SMITH | : | MOTION FOR IMMEDIATE HEARING |
| Defendant | : | |
| | : | |

.. .. .. .. .. .. .. .. .. .. .. .. .. .. .. .. .. .. .. .. .. ..

Respondent respectfully moves the Court pursuant to Rule 6(D) of the Federal Rules of Civil Procedure for an immediate hearing on Respondent's Motion for Remand which is being filed herewith and for leave to serve a copy of his Motion for Remand and Notice of Hearing thereof within five (5) days of the time specified for the hearing.

Good cause exists for this Motion as is clearly set forth in the Memorandum in Support of this motion attached hereto and made a part hereof.

Respectfully submitted,

Gary R. Hermon
Assistant Prosecuting Attorney
Allen County, Ohio
127-129 North Pierce Street
P. O. Box 546, Lima, Ohio 45802
ATTORNEY FOR PLAINTIFF

MEMORANDUM IN SUPPORT OF MOTION FOR IMMEDIATE HEARING ON MOTION FOR REMAND

This motion is being filed pursuant to Rule 6(D) of the Federal Rules of Civil Procedure which provides in material part as follows:

> "A written motion other than one which may be heard ex parte and notice of the hearing thereof shall be served not later than five (5) days before the time specified for the hearing unless a different period is fixed by these rules or by Order of the Court. Such an order for cause shown shall be made on

ex parte application . . . .'

On May 4, 1973, Lawrence S. Huffman, filed his affidavit in the Court of Common Pleas of Allen County, Ohio, charging Robert Smith with a violation of Revised Code Section 2905.35 for exhibiting obscene motion picture films. (See Exhibit A). At the same time the State of Ohio filed a Motion for Prior Adversary Hearing (See Exhibit B) which the Court ordered be conducted on May 7, 1973. (See Exhibit C).

The Court issued a summons in lieu of an arrest warrant (See Exhibit D) requiring the appearance of the defendant in court on May 7, 1973.

On the evening of May 7, 1973, the defendant Robert Smith was served the aforementioned summons, affidavit, motion for prior adversary hearing, certified copy of the court order ordering a prior adversary hearing and a subpoena duces tecum. (See Exhibit E). At the same time, the projectionist of the Cinema I Theater, Otis Hatfield, was served an identical subpoena duces tecum.

On the day of the hearing, Robert Smith filed his petition for removal herein.

The petition for removal filed herein is completely without foundation in law. The statutory authority for such filing as reflected in said petition for removal is wholly without merit as shown in the State's Memorandum in Support of Motion to Remand which is hereby incorporated by reference.

The State of Ohio further submits that this matter was awaiting a prior adversary hearing on the obscenity of the three motion picture films which are the subject of the criminal affidavit and that time is of the essence and the matter is pressing.

Unless this Court orders an immediate hearing on the State of Ohio's Motion to Remand, the State of Ohio's right to have the motion

picture films which are the subject of the criminal affidavit declared obscene and proceed in the prosecution thereof will result in substantial prejudice against the State of Ohio.

Gary R. Hermon
Assistant Prosecuting Attorney
Allen County, Ohio

PROOF OF SERVICE

I hereby certify that a copy of the foregoing Motion For Immediate Hearing and Memorandum attached thereto was mailed by regular U. S. Mail this _____ day of May, 1973, to attorney for Defendant, Ted Iorio, 435 South Hawley Street, Toledo, Ohio.

W-21

FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

State of Ohio,

Plaintiff,

vs.

Robert Smith,

Defendant.

Civil No. C 73-163

O R D E R

This cause came to be heard upon motion of the plaintiff for an immediate hearing on its motion to remand this action to the Court of Common Pleas of Allen County, Ohio. For good cause appearing, it is,

ORDERED that the motion of the plaintiff should be and hereby is overruled.

United States District Judge

In conformity with Rule 77 (d) F.R.C.P. please take notice that the following order of judgment was entered in this court on MAY [illegible] 1973

Dominic J. Cimino, Clerk

Toledo, Ohio.

## Appendix X

*State of Ohio v. Robert Smith*, 73 CR 098, (being a Criminal Case, filed on May 8, 1973, in the Court of Common Please of Allen County, Ohio)

Papers Included in Appendix: Page

Affidavit of Lawrence S. Huffman, filed May 8, 1973. . . . . 3

Motion for Prior Adversary Hearing, filed on May 8, 1973. . . . . 4

Affidavit of Police Officer Dennis Harrod re films "The Wedding" and "Sex And The Working Girl". . . . . 5-6

Journal Entry, filed May 8, 1973. . . . . 7

Summons for Robert Smith, filed May 8, 1973. . . . . 8-9

Subpena Duces Tecum re films "The Wedding" and "Sex And The Working Girl". . . . . 10

X-3

IN THE COURT OF COMMON PLEAS OF ALLEN COUNTY, OHIO

THE STATE OF OHIO :
Plaintiff : CASE NO. 73 CR 098
-vs- :
ROBERT SMITH : AFFIDAVIT
Defendant :
:

STATE OF OHIO
SS:
ALLEN COUNTY

Now comes LAWRENCE S. HUFFMAN, the duly elected and qualified Prosecuting Attorney of Allen County, Ohio, who being duly sworn according to law, deposes and says that on or about the 8th day of May, 1973, at the County of Allen aforesaid, one Robert Smith with knowledge of the contents and character of the obscene material did knowingly exhibit obscene material to wit: two motion picture films purportedly entitled / The Wedding, and Sex and The Working Girl contrary to Section 2905.35 of the Ohio Revised Code and against the peace and dignity of the State of Ohio.

Sworn to before me and subscribed in my presence, this 8th day of May, 1973.

Notary Public

FILED
1973 MAY -8 PM 3:45
ROBERT H. DUNLAP
CLERK OF COURTS
ALLEN CO. OHIO

IN THE COURT OF COMMON PLEAS OF ALLEN COUNTY, OHIO

| | | |
|---|---|---|
| THE STATE OF OHIO | : | 73 CR 098 |
| Plaintiff | : | CASE NO. _____ |
| -vs- | : | |
| ROBERT SMITH | : | MOTION FOR PRIOR ADVERSARY HEARING |
| Defendant | : | |
| | : | |

.. .. .. .. .. .. .. .. .. .. .. .. .. .. .. .. .. .. ..

Now comes the State of Ohio and moves the Court for an Order setting a hearing date certain for the purpose of conducting a prior adversary hearing as to the obscenity of the motion picture films exhibited at the Cinema I Theater, #69 Public Square, Lima, Ohio, on May 8, 1973, and purportedly entitled The Wedding, and Sex and The Working Girl.

The State of Ohio further moves that the Court determine at such hearing whether or not said motion picture films are obscene and that upon a judicial determination that said motion picture films are obscene, the Court retain custody of said motion picture films until the trial of this cause.

In support of said motion, the State of Ohio attaches hereto and incorporates by reference an affidavit which is marked Exhibit A.

Respectfully submitted,

Gary R. Hermon
Assistant Prosecuting Attorney
Allen County, Ohio
ATTORNEY FOR STATE OF OHIO

Exhibit A

## AFFIDAVIT

STATE OF OHIO
SS:
ALLEN COUNTY

DENNIS HARROD, being first duly sworn, says that he is a Police Officer for the City of Lima, Allen County, Ohio, and that at approximately 12:30 p.m., on May 8, 1973, affiant did pay the sum of $3.00 and thereby was admitted to the Cinema I Theater, #69 Public Square, Lima, Ohio.

Affiant says that the marquee of said theater advertised the following titled motion pictures "The Wedding" and "Sex and The Working Girl".

Affiant says that he did see two motion picture films while at the said Cinema I Theater and that the first film he observed was entitled "Sex and the Working Girl". The plot of the first film movie revolved about a female teacher teaching sex to other female persons utilizing as an instructional guide other motion picture films. Depicted upon the screen were nude males and females performing acts of lesbianism, sexual intercourse, fellatio and cunnilingus. Affiant says that all of said sexual acts were depicted as explicitly as such acts can be depicted in that the camera would focus in upon the actual sexual act in question and further that all of said sexual acts as depicted upon the screen were not simulated, but actually performed. The male penis was observed in a state of erection and actual penetration could be seen into the female vagina and female mouth.

Affiant says that the next motion picture film which he saw on said date at said location was entitled "The Wedding". The film was of a nature that affiant cannot with a reasonable degree of certainty summarize an apparent plot. The film revolved about sexual acts which were performed in apparently a photographic studio or modeling studio. The film contained various scenes of nude males and females performing sexual intercourse, cunnilingus, fellatio and lesbianism -- all of which were performed as

explicitly as above described in the prior motion picture. Affiant says that said film contained a segment in which the female inserted in her mouth an erect male penis and clearly depicted on the screen was semen coming from the said male penis and being licked by the said female. Affiant says that all of said sexual acts were actual and non-simulated with penetration being clearly ascertainable and that the camera would constantly focus in on the genitalia of the parties engaged in such sexual acts.

Further affiant saith not.

_____

Sworn to before me and subscribed in my presence, this 8th day of May, 1973.

_____
Notary Public

X-7

IN THE COURT OF COMMON PLEAS OF ALLEN COUNTY, OHIO

| | |
|---|---|
| THE STATE OF OHIO<br>Plaintiff<br>-vs-<br>ROBERT SMITH<br>Defendant | 73 CR 098<br>CASE NO. _____<br>JOURNAL ENTRY |

This matter came on to be heard upon the Motion of the State of Ohio for a prior adversary hearing.

The Court finds after due consideration of said motion together with the affidavit attached thereto that said motion is well taken, and accordingly,

IT IS ORDERED that a prior adversary hearing as to the obscenity of the motion picture films purportedly entitled The Wedding and Sex and The Working Girl be conducted at Courtroom # 2, before one of the Honorable Judges of the Common Pleas Court, on May 10, 1973, at 2:30 P.M.

By Robert M Light
JUDGE

THE STATE OF OHIO } SS CERTIFICATE OF COPY
Allen County.

I, ROBERT H. DUNLAP Clerk of the Court of Common Pleas within and for the aforesaid County and State, do hereby certify that the foregoing is a true and correct copy of the original Journal Entry now on file in said Clerk's office.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said Court at Lima, Ohio, this 8TH day of MAY A.D. 1973

(SEAL) ROBERT H. DUNLAP Clerk
Deputy

ROBERT H. DUNLAP
CLERK OF COURTS
ALLEN COUNTY, OHIO
FILED
1973 MAY -8 PM 4:01

IN THE COURT OF COMMON PLEAS OF ALLEN COUNTY, OHIO

| | | |
|---|---|---|
| THE STATE OF OHIO | : | 73 CR 098 |
| Plaintiff | : | CASE NO. _____ |
| -vs- | : | |
| | : | SUMMONS |
| ROBERT SMITH | : | |
| Defendant | : | |
| | : | |

.. .. .. .. .. .. .. .. .. .. .. .. .. .. .. .. .. .. .. ..

TO THE SHERIFF OF ALLEN COUNTY, OHIO:

You are hereby commanded to notify Robert Smith that he has had an affidavit filed against him by Lawrence S. Huffman in the Common Pleas Court of Allen County, Ohio, as follows:

State of Ohio, Allen County, SS:

Now comes Lawrence S. Huffman, the duly elected and qualified Prosecuting Attorney of Allen County, Ohio, who being duly sworn according to law, deposes and says that on or about the 8th day of May, 1973, at the County of Allen aforesaid, one Robert Smith with knowledge of the contents and character of the obscene material did knowingly exhibit obscene material to wit: two motion picture films purportedly entitled The Wedding, and Sex and the Working Girl contrary to Section 2905.35 of the Ohio Revised Code and against the peace and dignity of the State of Ohio.

/S/ Lawrence S. Huffman

Sworn to and subscribed before me this 8th day of May, 1973.

/S/ Gary R. Hermon
Notary Public

Robert Smith must appear in Common Pleas Court on May 10, 1973, at 2:30 P.M., in Courtroom # 2 before one of the Honorable Judges to answer to said affidavit.

Clerk, Common Pleas Court

By _____
Deputy Clerk

I certify this to be a true copy of the original summons with all endorsements thereon.

_____

By_____

RETURN

Sheriff's Office, Lima, Ohio, _____, 1973.

Received this writ _____, 1973, and on _____, 1973, I served the same on the defendant by leaving a certified copy thereof, with the endorsements thereon _____

_____

_____.

EDWARD L. FAIR, SHERIFF

By_____
Deputy Sheriff

X-10

CR. 18-B

# Subpena Duces Tecum

CRIMINAL CASE

Revised Code, Sec. 2945.45

73 CR 098

The State of Ohio, **Allen** County. Common Pleas Court

To the Sheriff of said County:

*You are hereby commanded to subpena*

**Robert Smith, c/o Cinema I Theater, #69 Public Square, Lima, Ohio**

**John Doe, c/o Cinema I Theater, #69 Public Square, Lima, Ohio**

*to be and appear before the Common Pleas Court at the Court House in said County, on the* **10th** *day of* **May** *A. D. 19* **73**, *at* **2:30** *o'clock* **P** *M., to testify as a witness in a certain case pending in said Court, wherein the State of Ohio prosecutes* **Robert Smith** ;

*and also to bring with* **them** , *and produce at the time and place aforesaid.*

**two motion picture films purportedly entitled The Wedding,**

**and Sex and The Working Girl** which were exhibited at Cinema I Theatre, #69 Public Square, Lima, Ohio, on May 8, 1973

*; and not depart the Court without leave.*

*And therein to fail not, under penalty of the law; and to have then and there this writ.*

*Said Court requires said attendance of said witnesses on behalf of the* **State**

*WITNESS my hand and the seal of said Court, this*

8th *day of* **May** *19* **73**

Robert N. Dunlap
*Clerk*

*By* Virginia Belopavlovich
*Deputy*

# Appendix Y

*State of Ohio v. Pursue Ltd.*, 73 CR 099,
(being a Criminal Case, filed on May 8, 1973,
in the Court of Common Pleas of Allen County,
Ohio)

Papers Included in Appendix:


| | Page |
|---|---|
| Affidavit of Lawrence S. Huffman, filed May 8, 1973 | 3 |
| Motion for Prior Adversary Hearing | 4 |
| Affidavit of Police Officer Dennis Harrod, Re films "The Wedding" and "Sex And The Working Girl" | 5-6 |
| Journal Entry, filed May 8, 1973 | 7 |
| Summons for Pursue Ltd., filed May 8, 1973 | 8-9 |
| Subpena Duces Tecum Re films "The Wedding" and "Sex And The Working Girl" | 10 |
| Memorandum in Support of Service, filed May 10, 1973 | 11-12 |

IN THE COURT OF COMMON PLEAS OF ALLEN COUNTY, OHIO

| | | |
|---|---|---|
| THE STATE OF OHIO | : | 73 CR 099 |
| Plaintiff | : | CASE NO. _____ |
| -vs- | : | AFFIDAVIT |
| PURSUE, LTD., a Delaware Corporation | : | |
| Defendant | : | |
| | : | |

.. .. .. .. .. .. .. .. .. .. .. .. .. .. .. .. .. .. ..

STATE OF OHIO
SS:
ALLEN COUNTY

Now comes LAWRENCE S. HUFFMAN, the duly elected and qualified Prosecuting Attorney of Allen County, Ohio, who being duly sworn according to law, deposes and says that on or about the 8th day of May, 1973, at the County of Allen aforesaid, one Pursue, Ltd., a Delaware Corporation, with knowledge of the contents and character of the obscene material did knowingly exhibit obscene material to wit: two motion picture films purportedly entitled The Wedding, and Sex and the Working Girl / contrary to Section 2905.35 of the Ohio Revised Code and against the peace and dignity of the State of Ohio.

_____

Sworn to before me and subscribed in my presence, this 8th day of May, 1973.

_____
Notary Public

FILED
MAY 8 3:47 PM 1973
CLERK OF COURTS
ROGER R. BEELAR

IN THE COURT OF COMMON PLEAS OF ALLEN COUNTY, OHIO

| | | |
|---|---|---|
| THE STATE OF OHIO | : | 73 CR 099 |
| Plaintiff | : | CASE NO. _____ |
| -vs- | : | |
| PURSUE, LTD. A Delaware Corporation | : | MOTION FOR PRIOR ADVERSARY HEARING |
| Defendant | : | |
| | : | |

Now comes the State of Ohio and moves the Court for an Order setting a hearing date certain for the purpose of conducting a prior adversary hearing as to the obscenity of the motion picture films exhibited at the Cinema I theater, #69 Public Square, Lima, Ohio, on May 8, 1973, and purportedly entitled The Wedding, and Sex and the Working Girl.

The State of Ohio further moves that the Court determine at such hearing whether or not said motion picture films are obscene and that upon a judicial determination that said motion picture films are obscene, the Court retain custody of said motion picture films until the trial of this cause.

In support of said motion, the State of Ohio attaches hereto and incorporates by reference an affidavit which is marked Exhibit A.

Respectfully submitted,

Gary R. Vernon
Assistant Prosecuting Attorney
Allen County, Ohio
ATTORNEY FOR STATE OF OHIO

FILED
1973 MAY -8 PM 3:47
ROGER H. MUHLAP
CLERK OF COURTS
ALLEN CO. OHIO

Exhibit A

# AFFIDAVIT

STATE OF OHIO
SS:
ALLEN COUNTY

DENNIS HARROD, being first duly sworn, says that he is a Police Officer for the City of Lima, Allen County, Ohio, and that at approximately 12:30 p.m., on May 8, 1973, affiant did pay the sum of $3.00 and thereby was admitted to the Cinema I Theater, #69 Public Square, Lima, Ohio.

Affiant says that the marquee of said theater advertised the following titled motion pictures "The Wedding" and "Sex and The Working Girl".

Affiant says that he did see two motion picture films while at the said Cinema I Theater and that the first film he observed was entitled "Sex and the Working Girl". The plot of the first film movie revolved about a female teacher teaching sex to other female persons utilizing as an instructional guide other motion picture films. Depicted upon the screen were nude males and females performing acts of lesbianism, sexual intercourse, fellatio and cunnilingus. Affiant says that all of said sexual acts were depicted as explicitly as such acts can be depicted in that the camera would focus in upon the actual sexual act in question and further that all of said sexual acts as depicted upon the screen were not simulated, but actually performed. The male penis was observed in a state of erection and actual penetration could be seen into the female vagina and female mouth.

Affiant says that the next motion picture film which he saw on said date at said location was entitled "The Wedding". The film was of a nature that affiant cannot with a reasonable degree of certainty summarize an apparent plot. The film revolved about sexual acts which were performed in apparently a photographic studio or modeling studio. The film contained various scenes of nude males and females performing sexual intercourse, cunnilingus, fellatio and lesbianism -- all of which were performed as

explicitly as above described in the prior motion picture. Affiant says that said film contained a segment in which the female inserted in her mouth an erect male penis and clearly depicted on the screen was semen coming from the said male penis and being licked by the said female. Affiant says that all of said sexual acts were actual and non-simulated with penetration being clearly ascertainable and that the camera would constantly focus in on the genitalia of the parties engaged in such sexual acts.

Further affiant saith not.

_____

Sworn to before me and subscribed in my presence, this 8th day of May, 1973.

_____
Notary Public

IN THE COURT OF COMMON PLEAS OF ALLEN COUNTY, OHIO

| | | |
|---|---|---|
| THE STATE OF OHIO | : | 73 CR 099 |
| Plaintiff | : | CASE NO. _____ |
| -vs- | : | JOURNAL ENTRY |
| PURSUE, LTD. A Delaware Corporation | : | |
| Defendant | : | |

.. .. .. .. .. .. .. .. .. .. .. .. .. .. .. .. .. .. .. ..

This matter came on to be heard on the Motion of the State of Ohio for a prior adversary hearing.

The Court finds after due consideration of said motion together with the affidavit attached thereto that said motion is well taken, and accordingly,

IT IS ORDERED that a prior adversary hearing as to the obscenity of the motion picture films purportedly entitled The Wedding, and Sex and the Working Girl be conducted at Courtroom # 2, before one of the Honorable Judges of the Common Pleas Court, on May 10, 1973, at 2:30 P.M.

/s/ Robert A. Light
JUDGE

THE STATE OF OHIO, Allen County, } SS CERTIFICATE OF COPY

I, ROBERT H. DUNLAP Clerk of the Court of Common Pleas within and for the aforesaid County and State, do hereby certify that the foregoing is a true and correct copy of the original Journal Entry now on file in said Clerk's office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Lima, Ohio, this 8th day of May A.D. 1973

(SEAL)

ROBERT H. DUNLAP Clerk

Deputy

FILED
1973 MAY 8 PM 4:08
ROBERT H. DUNLAP
CLERK OF COURTS
ALLEN COUNTY, OHIO

IN THE COURT OF COMMON PLEAS OF ALLEN COUNTY, OHIO

| | | |
|---|---|---|
| THE STATE OF OHIO | : | 73 CR 099 |
| Plaintiff | : | CASE NO. _____ |
| -vs- | : | SUMMONS |
| PURSUE, LTD., a Delaware Corporation | : | |
| Defendant | : | |
| | : | |

.. .. .. .. .. .. .. .. .. .. .. .. .. .. .. .. .. .. .. ..

TO THE SHERIFF OF ALLEN COUNTY, OHIO

You are hereby commanded to notify Pursue, Ltd., a Delaware Corporation that it has had an affidavit filed against it by Lawrence S. Huffman in the Common Pleas Court of Allen County, Ohio, as follows:

State of Ohio, Allen County, SS:

Now comes Lawrence S. Huffman, the duly elected and qualified Prosecuting Attorney of Allen County, Ohio, who being duly sworn according to law, deposes and says that on or about the 8th day of May, 1973, at the County of Allen aforesaid, one Pursue, Ltd., a Delaware Corporation, with knowledge of the contents and character of the obscene material did knowingly exhibit obscene material to wit: two motion picture films purportedly entitled The Wedding, and Sex and The Working Girl, contrary to Section 2905.35 of the Ohio Revised Code and against the peace and dignity of the State of Ohio.

/S/ Lawrence S. Huffman

Sworn to and subscribed before me this 8th day of May, 1973.

/S/ Gary R. Hermon
Notary Public

Pursue, Ltd., a Delaware Corporation, must appear in Common Pleas Court on May 10, 1973, at 2:30 P.M., in Courtroom # 2 before one of the Honorable Judges to answer to said affidavit.

Clerk, Common Pleas Court

By _____
Deputy Clerk

I certify this to be a true copy of the original summons with all endorsements thereon.

_____

By_____

RETURN

Sheriff's Office, Lima, Ohio, _____, 1973

Received this writ _____, 1973, and on _____, 1973, I served the same on the defendant by leaving a certified copy thereof with the endorsements thereon_____

_____

_____.

EDWARD L. FAIR, SHERIFF

By_____
Deputy

Ch 18 B

Baldwin Brothers, Publishers, Springfield, Ohio

# Subpena Duces Tecum

CRIMINAL CASE

Revised Code, Sec. 2945.45

73 CR 099

The State of Ohio, Allen County, Common Pleas Court

To the Sheriff of said County:

*You are hereby commanded to subpena*

Robert Smith, c/o Cinema I Theater, #69 Public Square, Lima, Ohio

John Doe, c/o Cinema I Theater, #69 Public Square, Lima, Ohio

*to be and appear before the Common Pleas Court at the Court House in said County, on the* 10th *day of* May *A. D. 19* 73, *at* 2:30 *o'clock* P.M., *to testify as a witness in a certain case pending in said Court, wherein the State of Ohio prosecutes* Pursue, Ltd., a Delaware Corporation ;

*and also to bring with* them , *and produce at the time and place aforesaid.*

two motion picture films purportedly entitled The Wedding, and Sex and the Working Girl which were exhibited at Cinema I Theatre #69 Public Square, Lima, Ohio, on May 8, 1973.

*; and not depart the Court without leave.*

*And therein to fail not, under penalty of the law; and to have then and there this writ.*

*Said Court requires said attendance of said witnesses on behalf of the* State

*WITNESS my hand and the seal of said Court, this*

*day of* May *19* 73

Robert N. Dunlap
*Clerk*

By Virginia Belgavlovich
*Deputy*

IN THE COURT OF COMMON PLEAS OF ALLEN COUNTY, OHIO

| | | |
|---|---|---|
| THE STATE OF OHIO | : | |
| Plaintiff | : | CASE NO. 73 CR 099 |
| -vs- | : | |
| | : | MEMORANDUM |
| PURSUE, LTD. | : | |
| Defendant | : | |

.. .. .. .. .. .. .. .. .. .. .. .. .. .. .. ..

The following Memorandum of Law is submitted to the Court on the oral motion of the defendant, Pursue, Ltd., to quash service of process upon the defendant, Pursue, Ltd.

It is the position of the State of Ohio that service of summons upon a corporation shall be made as provided for service of summons upon corporations in civil actions.

Rule 4.2 of the Ohio Rules of Civil Procedure, subparagraph 6 provides that a corporation may be served by several methods, one of which is by serving a managing or general agent of the corporation. The return made by the Deputy Sheriff serving the summons upon Pursue, Ltd., reflects that said summons was served upon Robert Smith, agent of Pursue, Ltd.

It would appear to the State of Ohio that if such service of process is to be challenged, it is incumbent upon the defendant to show by way of evidence that Robert Smith is not an agent of said corporation. The record on its face reflects proper service in accordance with Rule 4.2 of the Ohio Rules of Civil Procedure. The State of Ohio contends that to

avoid process, the defendant must show that he is not the agent of Pursue, Ltd. The State has abundant evidence to the contrary.

Respectfully submitted,

Gary R. Hermon
Assistant Prosecuting Attorney
Allen County, Ohio
127-129 North Pierce Street
P. O. Box 546, Lima, Ohio 45802
Telephone: (419) 229-0786
ATTORNEY FOR STATE OF OHIO

PROOF OF SERVICE

I hereby certify that a copy of the foregoing Memorandum was mailed by regular U. S. Mail this 14th day of May, 1973, to Ted Iorio, attorney for Pursue, Ltd., 435 South Hawley Street, Toledo, Ohio.

## Appendix Z

*State of Ohio v. Robert Smith*, 73 CR 098,
(being a Criminal Case, filed on May 8, 1973,
in the Court of Common Pleas at Allen County,
Ohio)

Papers Included in Appendix: Page

Journal Entry, filed May 11, 1973 of Contempt
Citation against Robert Smith. . . . . 3-4

Journal Entry, filed May 11, 1973, of Contempt
Citation against Otis Hatfield. . . . . 5-6

*Robert Smith and Otis Hatfield v. Edward Fair,
Sheriff of Allen County, Ohio*, C73-187,
(being a Petition for Habeus Corpus in the
Federal District Court for the Northern District
of Ohio, Western Division)

Order of Federal Judge Young, filed May 11,
1973, Admitting Smith and Hatfield to Bail. . . . . 7

Content of Petition for Writ of Habeas Corpus,
received by phone on May 15, 1973. . . . . 8-9

Answer of Sheriff Fair, filed May 16, 1973 . . . . . 10

Memorandum in Support of Right of Law
Enforcement to Require Production of
Films (less Exhibits A-H). . . . . 11-15

IN THE COURT OF COMMON PLEAS OF ALLEN COUNTY, OHIO

| | | |
|---|---|---|
| THE STATE OF OHIO | : | |
| Plaintiff | : | CASE NO. 73 CR 098 |
| -vs- | : | |
| ROBERT SMITH | : | JOURNAL ENTRY |
| Defendant | : | |
| | : | |

.. .. .. .. .. .. .. .. .. .. .. .. .. .. .. .. ..

This matter came on to be heard upon the appearance of Robert Smith, a witness subpoened in this cause by the State of Ohio, and said Robert Smith's failure to bring with him on May 10, 1973, at a prior adversary hearing two motion picture films which were exhibited at the Cinema I Theater, #69 Public Square, Lima, Ohio, on May 8, 1973.

The Court finds that Robert Smith was properly served a subpoena duces tecum in this cause on May 8, 1973. That said subpoena duces tecum required the said Robert Smith to appear on May 10, 1973, at 2:30 p.m., in this cause, and that said subpoena duces tecum did require Robert Smith to produce at the time and place aforesaid two motion picture films purportedly entitled "The Wedding" and "Sex and the Working Girl" which were exhibited at Cinema I Theater, #69 Public Square, Lima, Ohio, on May 8, 1973.

The Court further finds that the said Robert Smith had in his possession, custody and control, two motion picture films purportedly entitled "The Wedding" and "Sex and the Working Girl" which were exhibited at the Cinema I Theater

5

J. Entry

2. 2[illegible]

May 15th 73

Marjorie Grant

#69 Public Square, Lima, Ohio, on May 8, 1973.

The Court further finds that said Robert Smith has appeared at said motion hearing without the said motion picture films and has thereby failed and refused to perform the order of this Court directing that he appear on May 10, 1973, at 2:30 p.m., at a prior adversary hearing conducted in this cause with the two motion picture films which were exhibited at Cinema I Theater, #69 Public Square, Lima, Ohio, on May 8, 1973.

The Court further finds that the said Robert Smith's failure to produce the films aforementioned, is a disobedience of process issued to him and is thereby a contempt of this Court.

It is therefore ORDERED that the said Robert Smith be confined in the County Jail of Allen County, Ohio, for a period not to exceed ten (10) days. It is the further Order of this Court that the said Robert Smith can purge himself of such contempt by the production of said motion picture films.

JUDGE

2. 217

FILED
ROBERT H. [illegible]
CLERK OF COURTS
ALLEN CO., OHIO

IN THE COURT OF COMMON PLEAS OF ALLEN COUNTY, OHIO

| | | |
|---|---|---|
| THE STATE OF OHIO | : | |
| Plaintiff | : | CASE NO. 73 CR 098 |
| -vs- | : | |
| ROBERT SMITH | : | JOURNAL ENTRY |
| Defendant | : | |
| | : | |

.. .. .. .. .. .. .. .. .. .. .. .. .. .. .. ...

This matter came on to be heard upon the appearance of Otis Hatfield, a witness subpoened in this cause by the State of Ohio, and said Otis Hatfield's failure to bring with him on May 10, 1973, at a prior adversary hearing two motion picture films which were exhibited at the Cinema I Theater, #69 Public Square, Lima, Ohio, on May 8, 1973.

The Court finds that Otis Hatfield was properly served a subpoena duces tecum in this cause on May 8, 1973. That said subpoena duces tecum required the said Otis Hatfield to appear on May 10, 1973 at 2:30 p.m., in this cause, and that said subpoena duces tecum did require Otis Hatfield to produce at the time and place aforesaid two motion picture films purportedly entitled "The Wedding" and "Sex and the Working Girl" which were exhibited at Cinema I Theater, #69 Public Square, Lima, Ohio, on May 8, 1973.

The Court further finds that the said Otis Hatfield had in his possession, control and custody, two motion picture films purportedly entitled "The Wedding" and "Sex and the Working Girl" which were exhibited at the Cinema I Theater

CERTIFICATE OF [illegible]
[illegible] Clerk of the Court of Common
[illegible]

J. Entry

R: 710

May 15 '73

P.M. Court

#69 Public Square, Lima, Ohio, on May 8, 1973.

The Court further finds that said Otis Hatfield has appeared at said motion hearing without the said motion picture films and has thereby failed and refused to perform the order of this Court directing that he appear on May 10, 1973, at 2:30 p.m., at a prior adversary hearing conducted in this cause with the two motion picture films which were exhibited at Cinema I Theater, #69 Public Square, Lima, Ohio, on May 8, 1973.

The Court further finds that the said Otis Hatfield's failure to produce the films aforementioned, is a disobedience of process issued to him and is thereby a contempt of this Court.

It is therefore ORDERED that the said Otis Hatfield be confined in the County Jail of Allen County, Ohio, for a period not to exceed ten (10) days. It is the further Order of this Court that the said Otis Hatfield can purge himself of such contempt by the production of said motion picture films.

JUDGE

Z-7

FILED
MAY 11 4 50 PM '73
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO

IN THE FEDERAL DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Robert Smith
and
Otis Hatfield

Petitioners

-vs-

Edward Fair, Sheriff of Allen County, Ohio

Respondent

No. C 73-187

ORDER

Upon motion of Petitioners' counsel and for good cause shown,

IT IS HEREBY ORDERED that Petitioners be admitted to bail with surety in the amount of $1,000 as to each petitioner. [illegible]

IT IS FURTHER ORDERED that Respondent herein be immediately notified of this order and a hearing be set immediately to determine the merits herein.

JUDGE

In conformity with Rule 77 (d) F.R.C.P.
please take notice that the following order of the court
was entered in this cause on MAY 11 1973
Dominic J. Cimino, Clerk

The petition of Robert Smith and Otis Hatfield on behalf of counsel respectfully shows:

1. Petitioners make application herein for a Writ of Habeas Corpus in that they are unlawfully detained and restrained of their liberties by Edward L. Fair and they are now in the custody of the said Edward Fair in the Allen County, Ohio Jail.

2. The Cause or pretext of such detention and restrairt is contempt of court in the Court of Common Pleas of Allen County, Ohio, for failure to comply with subpoena duces tecum (attached hereto is Exhibit A). The said judgment of contempt was entered by the Honorable Robert M. Light, Judge of the Court of Common Pleas of Allen County, Ohio. The Court having imposed a jail sentence of ten days or until petitioners purged themselves by complying with said subpoena duces tecum. The date of imposition of sentence was May 10, 1973. No written journal entry has been docketed as of the date of this petition. Petitioners were represented by Lawrence Sturtz, Esq. Room 1180, 88 East Broad Street , Columbus, Ohio 43215.

3. Said detention and restraint is unlawful in that petitioners' constitutional rights under the 5th and 14th amendment of the Constitution of the United States have been violated in that the State Court failed to recognize petitioners' rights under due process of law and right against self incrimination.

4. Petitioners have no adequate remedy of law in the State of Ohio in that habeas corpus in the State Court will not lie from a jucgment of contempt, said being reviewed only by appeal and the Supreme Court of Ohio has in effect approved the procedures employed against petitioners in direct contravention of their constitutional rights. (See Exhibit B, State of Ohio vs. Robert Boyd, S.C.#73-183, thereby affirming the Allen County Court of Appeals).

5. (A) On May 8, 1973, the State of Ohio, by Lawrence S. Huffman, filed an affidavit alleging that the petitioner , Robert Smith, exhibited obscene material in violation of Ohio Revised Code, Section 2905.35 (See Exhibit C).

(B) On the same date, motion for a prior adversary hearing, with affidavit in support thereof, was filed by Gary R. Hermon, Assistant Prosecuting Attorney, Allen County, Ohio. (See Exhibit D) On the same date a summons was issued notifying the petitioner , Robert Smith,that an affidavit had been filed against him. (See Exhibit E).

On the same date, subpoena duces tecum was issued by the Clerk of Courts directed to Robert Smith, c/o Cinema I Theater, #69 Public Square, Lima, Ohio, (See Exhibit F) and was served upon petitioner Robert Smith and petitioner Otis Hatfield.

On May 10, 1973, the "Prior Adversary hearing" came on to be heard before the Honorable Judge Robert M. Light, at which time the petitioners were declared to be in contempt of Court for failure to comply with the subpoena duces tecum served upon them as heretofore mentioned.

Upon oral motion of counsel, Lawrence Sturtz, for bond, the Court refused the same.

No application for this writ has heretofore been made to any other court of judge.

WHEREFORE, petitioners pray that a Writ of Habeas Corpus be issued to Edward Fair, Sheriff of Allen County, Ohio, commanding him to produce the persons of petitioners before this Court at a time and place set and to show cause if he has any why he so illegally is holding them in restraint of their liberties and in the meantime bail be fixed in accordance with the pleadings herein presented.

verification

certification of service.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

ROBERT SMITH
and
OTIS HATFIELD

Petitioners

-vs-

EDWARD FAIR, Sheriff
of Allen County, Ohio

Respondent

CASE NO. C73-187
JUDGE NICHOLAS J. WALINSKI

ANSWER

STATE OF OHIO
SS:
ALLEN COUNTY

Edward L. Fair, being first duly sworn, says that he is the Sheriff of Allen County, Ohio; that on May 10, 1973, he placed in custody and under restraint the petitioners, Robert Smith and Otis Hatfield, pursuant to the Order of the Court of Common Pleas of Allen County, Ohio, certified copies of which are attached hereto and incorporated by reference; that the bodies of the said Robert Smith and Otis Hatfield cannot be produced by affiant at the hearing hereof for the reason that the said Robert Smith and Otis Hatfield were ordered admitted to bail on May 11, 1973, in Case No. C73-187 in the United States District Court, Northern District of Ohio, Western Division, entitled Robert Smith and Otis Hatfield, petitioners, vs. Edward Fair, Sheriff of Allen County, Ohio, Respondent, and were thereby released from the custody and restraint at _____ p.m., May 11, 1973.

Further affiant saith not.

_____

Sworn to before me and subscribed in my presence, this _____ day of May, 1973.

_____
Notary Public

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

| | | |
|---|---|---|
| ROBERT SMITH and OTIS HATFIELD | : | |
| Petitioners | : | CASE NO. C73-187 |
| -vs- | : | JUDGE NICHOLAS J. WALINSKI |
| EDWARD FAIR, Sheriff of Allen County, Ohio | : | MEMORANDUM |
| Respondent | : | |

.. .. .. .. .. .. .. .. .. .. .. .. .. .. .. .. .. .. .. .. ..

FACTS

On May 8, 1973, Robert Smith and Otis Hatfield were each issued an identical subpoena duces tecum (See Exhibit A) requiring that they produce at a prior adversary hearing on May 10, 1973, two motion picture films exhibited at Cinema I Theater, #69 Public Square, Lima, Ohio, and purportedly entitled "The Wedding" and "Sex and the Working Girl".

On May 10, 1973, both failed to bring the films subpoened. During the course of the hearing, the State Court found both to be in contempt of court for their respective disobediences to Court process. (See Exhibits B and C).

ISSUE

Can a defendant and/or witness be compelled to produce at a prior adversary hearing by way of a subpoena duces tecum an allegedly obscene motion picture film?

DISCUSSION

The United States District Court, Northern District of Ohio, Western

Division, has consistently held that before an allegedly obscene motion picture film can be seized, it must first be scrutinized by a magistrate in a prior adversary hearing. This was the ruling by the Court in Boyd v. Huffman, Case No. 70-296, and as recently as April, 1973, in Pursue, Ltd. v. Huffman, Case 72-432.

If, then, an allegedly motion picture film cannot be seized for evidence purposes as an incident to an arrest or pursuant to a search warrant without a prior adversary hearing, by what means did the Court contemplate that such film could be viewed in a prior adversary setting? The Court expressed in correspondence to the Prosecuting Attorney of Allen County, Ohio, Lawrence S. Huffman, the means by which films could be produced. (See Exhibit D). Indeed, when Mr. Huffman issued a subpoena duces tecum for the allegedly obscene motion picture film which was the subject of the aforementioned letter and which resulted in contempt proceedings for such issuance, the Court again approved the use of a subpoena duces tecum to compel production of the film in question. (See Exhibit E).

In addition to the reasons and citations of law given by this Court in Judge Young's opinion attached, there appears to be abundant authority that a subpoena duces tecum is the proper vehicle to require production of an allegedly obscene motion picture film.

Of course, the most obvious logical reason is that the Supreme Court of the United States, when holding that obscenity was outside the scope of First Amendment protection and, generally, laws regulating obscenity were, therefore, constitutional in Roth v. United States, 354 U.S. 476, 77 S. Ct. 1304, and many later cases, could not have contemplated the creation of unlawful conduct for which there is no constitutional means of enforcement. If law enforcement officials cannot seize

an allegedly obscene film for evidence purposes either as an incident to an arrest or pursuant to search warrant without a prior adversary hearing and cannot constitutionally compel production of such film at such hearing, then obscenity laws regulating exhibition of obscene material, although constitutional, are constitutionally unenforceable.

"The privilege against self-incrimination relates only to a compulsory oral examination, or the equivalent thereof, of an accused person either before or on trial; it does not protect against other forms of examination. It protects him from being required to incriminate himself by speech or the equivalent of speech, such as written statements or confessions or actions which the accused might use in place of words for the purpose of intending to communicate an idea." 21 Am Jur 2d, Criminal Law, Section 354. This construction of the Fifth Amendment has permitted the compulsory taking of blood, handwriting exemplars, voice prints, etc.

In the instant case, the State seeks compulsory production of films, not testimony or incriminating speech. The State seeks production of something tangible, to wit: a film, much like the State could seek production of a handwriting exemplar in a forgery case.

Respondent anticipates that petitioners will attempt to analogize and contend that since an accused cannot be compelled to produce private papers or documents that may contain incriminating evidence citing Boyd v. U.S., 116 U.S. 616, 6 S. Ct. 524, he cannot be compelled to produce films. The distinctions are obvious. First, a man's private papers are often in his own hand and are merely his oral utterances or speech on paper. Second, a man's private papers are just that, private, not voluntarily opened to public scrutiny.

These distinctions were apparent to the Arizona Supreme Court in Anderson v. Coulter, 499 P 2d 103. A copy of the well-reasoned

opinion of Anderson v. Coulter, supra, is attached and marked Exhibit F.

Failure to obey a subpoena duces tecum which required production of allegedly obscene material was recently the subject of a recent United States Supreme Court decision. In Silvers v. Dowling, Case No. 72-871, United States Supreme Court, one Shurgin was issued a subpoena duces tecum for two allegedly obscene films at a hearing scheduled to determine whether an earlier issued injunction enjoining Shurgin from exhibiting obscene material had been violated. Upon advice of his counsel, Silvers, Shurgin refused to obey the order. Upon the representations of Silvers that the two films in question would be made available at a later hearing, the trial court recalled an attachment for Shurgin previously issued by the Court. At the scheduled hearing Silvers announced to the Court that he was unable to produce the films in question. The trial court found Silvers in contempt of court which judgment was eventually appealed to the United States Supreme Court. The U. S. Supreme Court in Silvers v. Dowling, supra, in a per curiam decision dismissed the appeal. A copy of the appellee's brief and announcement of the Supreme Court's dismissal are attached hereto and marked Exhibits G and H, respectively.

In conclusion, respondent respectfully submits that on the basis of earlier decisions of this Court as to the use of a subpoena duces tecum, the well reasoned rationale of Anderson v. Coulter, supra, the historical application of the Fifth Amendment to speech only, and the unreasonable and oppressive result if this Court should, after ordering law enforcement officials to conduct prior adversary hearings, conclude that the only means by which such a hearing could be conducted is violative of petitioners' rights under the Fifth Amendment, petitioners' application

for a Writ of Habeas Corpus should be denied.

Respectfully submitted,

Gary R. Harmon
Assistant Prosecuting Attorney
Allen County, Ohio
127-129 North Pierce Street
P. O. Box 566, Lima, Ohio
Telephone: (419) 223-0786
ATTORNEY FOR RESPONDENT

PROOF OF SERVICE

I hereby certify that a copy of the foregoing Memorandum was mailed by regular U. S. Mail this ___ day of May, 1973, to attorney for Petitioners, Ted Iorio, 435 South Hawley Street, Toledo, Ohio.

## Appendix AA

Miscellaneous Papers


| | Page |
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| Certificate of Incorporation of Pursue Ltd., filed | 3-6 |
| Application of Pursue Ltd., for License, dated Nov. 20, 1972 | 7 |
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| Final Decree in *State of Alabama ex rel Sweeton v. First Amendment Foundation Inc. et al*, in the Circuit Court of Madison County Case No. 30846, dated Feb. 23, 1973 | 28-29 |
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| Opinion and Order of Federal District Judge Sam C. Pointer Jr. in *General Corp. et al v. Sweeton et al*, in the U. S. District Court Northern District of Alabama, Northeastern Division, filed Mar 8, 1973 | 32-35 |
| Letter of Chief Judge Brown to Federal Judge Pointer Jr., dated March 19, 1973 | 36-37 |

CERTIFICATE OF INCORPORATION

OF

PURSUE, LTD.

1. The name of the corporation is

PURSUE, LTD.

2. The address of its registered office in the State of Delaware is No. 100 West Tenth Street, in the City of Wilmington, County of New Castle. The name of its registered agent at such address is The Corporation Trust Company.

3. The nature of the business or purposes to be conducted or promoted is:

To make investments in the entertainment industry, including, but not limited to record shoppes, theatres and bookstores. To import, export, buy, sell and manufacture films, records and sound recordings of all kinds, books and magazines of all types and descriptions.

To engage in any lawful act or activity for which corporations may be organized under the General Corporation Law of Delaware.

4. The total number of shares of stock which the corporation shall have authority to issue is one hundred (100); all of shch shares shall be without par value.

5A. The name and mailing address of each incorporater is as follows:

| NAME | MAILING ADDRESS |
|---|---|
| S. E. Widdoes | 100 West Tenth Street<br>Wilmington, Delaware 19801 |
| W. J. Reif | 100 West Tenth Street<br>Wilmington, Delaware 19801 |
| R. A. Finger | 100 West Tenth Street<br>Wilmington, Delaware 19801 |

5B. The name and mailing address of each person, who is to serve as a director until the first annual meeting of the stockholders or until a successor is elected and qualified, is as follows:

| NAME | MAILING ADDRESS |
|---|---|
| Robert E. Smith | 2005 100 Colony Square<br>Atlanta, Georgia 30309 |

6. The corporation is to have perpetual existence.

7. In furtherance and not in limitation of the powers conferred by statute, the board of directors is expressly authorized:

To make, alter or repeal the by-laws of the corporation.

8. Meetings of stockholders may be held within or without the State of Delaware, as the by-laws may provide. The books of the corporation may be kept (subject to any provision contained in the statutes) outside the State of Delaware at such place or places as may be designated from time to time by the board of directors or in the by-laws of the corporation. Elections of directors need not be by written ballot unless the by-laws of the corporation shall so provide.

9. The corporation reserves the right to amend, alter, change or repeal any provision contained in this certificate of incorporation, in the manner now or hereafter prescribed by statute, and all rights conferred upon stockholders herein are granted subject to this reservation.

WE, THE UNDERSIGNED, being each of the incorporators named, for the purpose of forming a corporation pursuant to the General Corporation Law of the State of Delaware, do make this certificate, hereby declaring and certifying that this is our act and deed and the facts herein stated are true, and accordingly have hereunto set our hands this 6th day of December 1972.

AA-6

# State of Delaware

## Office of Secretary of State

I, Walton H. Simpson, Secretary of State of the State of Delaware, do hereby certify that the above and foregoing is a true and correct copy of Certificate of Incorporation of the "FURSUE, LTD.", as received and filed in this office the sixth day of December, A.D. 1972, at 10 o'clock A.M.

In Testimony Whereof, I have hereunto set my hand and official seal at Dover this fifteenth day of January in the year of our Lord one thousand nine hundred and seventy-three.

Walton H Simpson

Secretary of State

Asst Secretary of State

FORM 120

AA-7

# THE CITY OF LIMA, OHIO

## APPLICATION FOR

Date Applied for November 20, 1972 No._____

_____ Theatre _____ License

Issue to Pursue Ltd. Business Address Box 235, Russells Point, O.

Applied for by Robert L. Hollis (Owner) (Agent) Residence Address R.R. #1, Russells Point, O.

Location for which License is desired Cinema I

Nature of License Operate Theatre, under 400 seating capacity

In signing this application, I agree to abide by all Ordinances, Rules and Regulations pertaining to this subject now or hereafter passed by the City Council of Lima; or by any official empowered to issue such regulations.

Fees 60.00 Deposits _____ Signed Robert L. Hollis

Approved _____

THIS IS NOT A LICENSE

# THE CITY OF LIMA, OHIO

## APPLICATION FOR

Date Applied for Nov. 20, 1972 No._____

_____ Theatre _____ License

Issue to Cinema I Business Address: 69 Public Square

Applied for by Pursue Ltd. by Robert L. Hollis (Owner) (Agent) Residence Address R.R. #1, Russells Point, Ohio Box 235

Location for which License is desired _____

Nature of License Operate Theatre, Transfer Ownership from William Dakota to Robert L. Hollis

In signing this application, I agree to abide by all Ordinances, Rules and Regulations pertaining to this subject now or hereafter passed by the City Council of Lima; or by any official empowered to issue such regulations.

Fees .50 Deposits _____ Signed Robert L. Hollis

Approved _____

THIS IS NOT A LICENSE

# AA-8

## LEASE

THIS LEASE entered into this 1st day of November, 1971, by and between FLORA MARY MOOR, LELAND S. COLLINS, and SARA WALLACE (hereinafter referred to as "Lessor"), and WILLIAM KERN, JR. (hereinafter referred to as "Lessee"), WITNESSETH:

That in consideration of the rents, covenants, and conditions hereinafter set forth, on the part of said Lessee to be paid, performed and observed, said Lessor does hereby demise, let and lease unto said Lessee, the following described premises, situated in the City of Lima, County of Allen, and State of Ohio, to-wit:

> That portion of the following described premises now occupied by the theater building formerly known as the Sigma Theater:
>
> Inlot Number one hundred twenty-seven (127) in the original plat of the Town, now CITY, of LIMA, ALLEN COUNTY, OHIO.

Said leased premises are to be used for a theater or for any other lawful purpose.

To have and to hold the same unto said Lessee for the full term of five (5) years beginning on the first day of October, 1971, and terminating on the 30th day of September, 1976, subject to the payment, performance, and observance by said Lessee of each and every, the rents, covenants, and conditions by said Lessee to be paid, performed, and observed, as hereinafter set forth.

Said Lessee does hereby covenant and agree with the said Lessor, their heirs, successors and assigns, as follows, to-wit:

1. That said Lessee will and does hereby accept said premises in the condition they may be at the commencement of the term hereof, subject to all defects therein, whether concealed or otherwise, and whether known or unknown to said Lessor, and to release and forever discharge said Lessor from any and all damages of every kind and nature that may be in any way occasioned

For value received, all my right, title, and interest in and to the within Lease and the property therein described is hereby assigned and transferred to Pursue, Ltd., a Delaware corporation, without releasing me of my own personal liability thereon so far as Lessor is concerned.

Lima, Ohio November 17, 1972.

Pursue, Ltd. hereby accepts the obligations and property rights set forth in the foregoing Lease. Pursue, Ltd. By _____ Pres.

thereby, and at all times to indemnify and save said Lessor, said premises and the improvements thereon harmless from all liens and all liability in any way arising out of the use or condition of said premises or of the improvements thereon.

2. Lessee hereby covenants and agrees to pay as rent to the Lessor, at 00" Savings Building, Lima, Ohio 45801, or such other place as the Lessor may from time to time designate by written notice, an annual rental of Four Thousand Eight Hundred and no/100ths Dollars ($4,800.00), for the first year of the term hereof, and an annual rental of Six Thousand and no/100ths Dollars ($6,000.00) for each successive year of said term, payable in monthly installments of Four Hundred and no/100ths Dollars ($400.00) per month for the first year of the said term by the tenth day of each month, and monthly installments of Five Hundred and no/100ths Dollars ($500.00) for the second, third, fourth, and fifth years of the said term, payable by the tenth day of each month.

3. In addition to the rental hereinbefore provided, the Lessee shall deposit with the Lessor the sum of Two Thousand Four Hundred Dollars ($2,400.00) in cash or other form acceptable to Lessor as security for the payment of rent provided for herein; and for the payment of all other sums of money provided for herein and for the observance and performance by the Lessee of all the terms, provisions, and conditions of this Lease to be performed by the Lessee; and further to indemnify the Lessor for any loss, cost, fees, or expense which the Lessor may incur by reason of any default as aforesaid by the Lessee.

The Lessor shall repay to the Lessee the security deposit or any balance thereof upon the termination or expiration of the term of this Lease or any renewal thereof. In the event of any failure in the payment of rent or other sums or of any default by the Lessee in the performance of the terms, provisions, and conditions of this Lease, the Lessor shall have the right to

apply the security deposit against any loss, cost, fees and expense caused thereby.

Upon receipt of the said sum the Lessor shall deposit the same in The City Loan and Savings Company in an account in the name of the attorneys for the Lessor, Meredith, Meredith, Tait & Basinger. Interest earned during the period of the deposit in accordance with the terms of this provision of the Lease shall be the sole property of the Lessee and shall be paid to him in accordance with the rules of the depository herein provided.

4. Conveyed herewith and by way of security interest to the Lessor all of the chattels owned by Lessee for the purpose of further securing the said Lessor relative to the payment of rentals and compliance with all terms and conditions of this Lease. Such equipment is listed on Exhibit "A" attached hereto and made a part of this Lease as if fully rewritten herein.

5. Lessee will pay all real estate taxes and assessments now and hereafter due and payable during the term of this Lease. Lessee shall pay all personal property taxes and assessments which may be due or payable during the term of this Lease or any renewal thereof, provided, however, that real estate taxes for the year 1971 shall be pro-rated to the date of October 1, 1971, between the Lessor and the Lessee.

6. Lessor shall keep said premises fully insured with comprehensive fire insurance for its full insurable value. Lessee shall be responsible for the insuring of all equipment located in or about the premises and shall purchase and pay for public liability insurance in the sum of not less than $100,000/$300,000 in coverage, which shall be in the name of the Lessee and the Lessor.

7. Lessee shall pay for all electricity, gas, water, heat, and other utilities which shall or may be assessed and charged against the premises during the term of said Lease.

8. That said lessee will make all repairs in the interior of the premises hereby leased and will indemnify and save harmless said lessor from and against all liens, claims, and damages by reason of any repairs or improvements which may be made by said lessee on said premises, except repairs to the roof, sidewalks, and exterior of the building, which shall be made by and at the expense of said lessor, upon reasonable notice given by Lessee of the necessity therefor.

9. That said Lessee will at all times keep the sidewalks along said premises free and clear of obstructions to travel thereon, and of snow and ice.

10. That said Lessee will use and keep said premises in a careful, safe, and proper manner, and will carefully conduct and guard all fires that may be conducted thereon.

11. That said Lessee will not commit or suffer any waste thereon.

12. That said Lessee will keep said premises, and all parts thereof, and all fixtures, machinery, and apparatus, in good repair and in such condition that no damage will occur to any person by reason thereof.

13. That said Lessee will fully comply with and obey all laws, ordinances, rules, regulations, and requirements of all regularly constituted authorities, in any way affecting said premises or the use thereof, or this Lease.

14. That said Lessee will not use or occupy said premises for any unlawful purpose, and provided, further, that the conviction of the Lessee or any agent or employee of his in connection with the use or occupancy of this building for any crime or misdemeanor committed under the laws of the State of Ohio, or the Ordinances of the City of Lima, Ohio, shall void this Lease when such conviction shall become final and shall work an immediate forfeiture thereof in favor of the Lessor, at the Lessor's option.

15. That said Lessee will make no change in the construction of the building on said premises, without the written consent of the Lessor.

16. That said Lessee will permit said Lessor and the agents of said Lessor to enter upon said premises at all reasonable times, to examine the condition thereof, or make such repairs, additions, or alterations therein as may be necessary for the safety, preservation, or improvement thereof, or of said building, or to exhibit the same.

17. Lessee will replace all window glass or plate glass installed in any of said buildings at his own expense.

18. That said Lessor shall not be liable for any loss or damage occasioned by any defect in said premises, or by defective wiring, plumbing, gas, water, steam, hot water, or other pipes, or from sewage, or by the bursting, leaking, or running of any cistern, tank, boiler, washstand, closet, or wastepipe, or by water, snow, or ice upon the roof, skylight, trap door, or otherwise, or by the acts or negligence of co-tenants, or other occupants of said building, or of the owner or occupant of adjacent, contiguous property.

19. Lessee shall at all times keep the sanitary and drainage system in good repair and condition.

20. Lessee will keep said premises in such repair and condition as may be required by the Board of Health, or other city, state, or federal authorities, free of all cost to said Lessor.

21. Lessee shall and will save Lessor harmless from any and all claims and demands of every kind and nature, in favor of any person, whether by way of damages or otherwise, arising from the failure on the part of the Lessee to perform and observe any covenant or condition thereof.

22. That no waiver, on the part of said Lessor, their heirs, successors or assigns, of any default or breach by said Lessee of any covenant, agreement, and condition of this Lease on

their part to be kept and performed, shall be construed to be a waiver of the rights of said Lessor as to any future default or breach by said Lessee of any of the covenants, agreements, and conditions of this Lease on his part to be performed.

23. That said Lessee will surrender and deliver up said premises and all appurtenances thereto excepting those items set forth on Schedule A hereof and all chattels and equipment, whether herein demised or placed upon the said premises or used by the Lessee in connection with the operation of said theater, at the end of the term in as good order and condition as the same now are or may be put by said Lessor, reasonable use and natural wear and tear or unavoidable casualty excepted. Provided, however, that if said rent, or any part thereof, shall at any time be in arrear and unpaid, with or without any demand being made therefor, or if said Lessee shall fail to keep and perform and observe any of the covenants, agreements, or conditions of this Lease on the part of said Lessee to be kept, performed, and observed, or if said Lessee shall be adjudged a bankrupt, or shall make an assignment for creditors, or if the interest of the Lessee herein shall be sold under execution, or other legal process, it shall be lawful for said Lessor, their heirs, successors and assigns, to enter into said premises and again have, repossess, and enjoy the same, as if this Lease had not been made, and thereupon this Lease, and everything herein contained, on the part of said Lessor to be done and performed, shall cease, terminate, and be utterly void, without prejudice, however, to the right of the Lessor to recover from said Lessee all rent due up to the time of such entry. In case of such default and entry by said Lessor, said Lessor may relet said premises for the remainder of said term for the highest rent obtainable, and may recover from said Lessee any deficiency between the amount obtained and the amount hereinbefore reserved.

24. Should said Lessee, with or without the express or implied consent of said Lessor, continue to hold and occupy said

premises after the expiration of the term of this lease, such holding over beyond the term and the acceptance or collection of rent by Lessor, shall operate and be construed as creating a tenancy from month to month, and not for any other term whatsoever, but the same may be terminated by said Lessor by giving said Lessee thirty (30) days written notice thereof, and at any time thereafter said Lessor may re-enter and take possession of the said premises, any rule in law or equity to the contrary notwithstanding.

25. In case the premises hereby leased shall be partially damaged by fire but not rendered untenantable, the same shall be repaired with all proper speed at the expense of the Lessor, but if the damage shall be so extensive that said premises are rendered unfit for occupancy by said Lessee, then in that event Lessor shall have the option of repairing said damage to said premises, if said damage can be repaired within a period of one hundred twenty (120) days from the occurrence of said damage and thereafter continue this Lease. It is expressly agreed between Lessor and Lessee that in the latter case, if said Lessor shall elect to repair said premises, then the rent herein reserved shall cease from the time of the occurrence of said damage, and shall be again payable from the date when such repairs shall be completed within said time as herein set forth. And said Lessor, for themselves, their heirs, successors, and assigns, hereby covenants and agrees with said Lessee, his heirs, successors and assigns, that said Lessee paying rents and performing and observing each and every covenant and condition hereof on the part of said Lessee to be performed and observed, said Lessee shall peaceably and quietly hold, occupy, and enjoy said premises during the term, without any let, hindrance, or molestation by any person whatsoever.

26. Lessee has been made aware of the status of existing ground leases relative to the said theater building now the

subject of litigation in the Court of Common Pleas of Allen County, Ohio, and while it is not anticipated that such litigation or the involvement in regard thereto could in any way affect the occupancy of the said building, it is understood by Lessee that such involvement resulting from the eventual adjudication of a superior right of any other person in regard to the cause now pending shall result in a termination of the lease as if by mutual agreement of the parties.

27. Lessee is hereby granted an option to renew this Lease for an additional term of five (5) years on the same terms and conditions as during the original term except as to rentals, duration of the term, and further rights of renewal; provided, however, that Lessee shall notify Lessor not less than six (6) months prior to the commencement of any such renewal term of his intention to renew such option, provided, further, that Lessee has at all times prior hereto fully complied with the terms and conditions hereof and that this Lease is then in full force and effect. The rental to be paid in the event of a renewal shall be negotiated by the parties and shall in no case exceed a gross increase in the amount of fifty percent (50%) of the rental provided for herein.

28. Forest Moor, Serelda Collins, and William P. Wallace, the husbands and wife of the Lessors herein, do by the affixing of their signatures hereon, hereby waive all rights of dower which they might have in the said premises.

IN WITNESS WHEREOF, the said Lessor and Lessee have hereunto set their hands to duplicates hereof, on the day and year first above written.

Signed and acknowledged in
the presence of:

Flora Mary Moor

Forest Moor

Serelda Collins

Sara Wallace

William P. Wallace

"LESSOR"

William Kern, Jr.

"LESSEE"

STATE OF OHIO )
)SS:
COUNTY OF ALLEN )

Before me, a Notary Public in and for said coun personally appeared the above named Flora Mary Moor and Forest Moor, who acknowledged that they did sign the foregoing ...ent and that the same is their free act and deed.

IN TESTIMONY WHEREOF, I have hereunto set my ha official seal at Lima, Ohio, this 23rd day of ..., ...

Notary Public, Allen County, ...

THE STATE OF Florida )
) SS:
COUNTY OF Lake )

Before me, a Notary Public in and for said coun personally appeared the above named Leland S. Collins and Serelda Collins, who acknowledged that they did sign the foregoing ... ment and that the same is their free act and deed.

IN TESTIMONY WHEREOF, I have hereunto set my hand a official seal at Clermoont, Florida, this 18th d ... March, 1972.

Notary Public, ... Co., ...

NOTARY PUBLIC STATE OF FLORIDA AT ...
MY COMMISSION EXPIRES OCT 24, 1...
GENERAL INSURANCE UNDERWRITERS

THE STATE OF FLORIDA )
) SS:
COUNTY OF PINELLAS )

Before me, a Notary Public in and for said county personally appeared the above named Sara Wallace and William P. Wallace, who acknowledged that they did sign the foregoing instrument and that the same is their free act and deed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at St. Petersburg, Florida, this 7th day of March, 1972.

Mary Lorraine Carson
Notary Public, Pinnellas County, Florida

Notary Public, State of Florida at Large
My Commission Expires FEBRUARY 24, 1973

THE STATE OF OHIO )
) SS:
COUNTY OF ALLEN )

Before me, a Notary Public in and for said county personally appeared the above named William Kern, Jr. who acknowledged that he did sign the foregoing instrument and that the same is his free act and deed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at Lima, Ohio, this 24th day of February, 1972.

Malcolm D. Basinger
Notary Public, Allen County, Ohio

THIS INSTRUMENT PREPARED BY:

Malcolm D. Basinger
Attorney at Law
607 Savings Building
Lima, Ohio 45801

All chattel property located in and about the Debtor's address and including, but not limited to the following:

518 theater seats

Two (?) Super Simplex 35mm motion picture projectors

Complete sound system as installed

Screen as installed

All property being used in and about a theater business conducted at 69 Public Square, Lima, Allen County, Ohio.

"EXHIBIT A"

# APPEARANCE AND EXECUTION Docket CIVIL—2 72CV0326

| NAMES OF PARTIES TO SUIT | ATTORNEYS | ACTION |
|---|---|---|
| State of Ohio, ex rel.<br>Lawrence S. Huffman<br>127-129 North Pierce Street<br>Lima, Ohio<br>-vs- Plaintiff<br>William H. Dakota<br>2650 West Market Street<br>Lima, Ohio<br><br>Flora May Collins Moor<br>104 South Dale Drive | Lawrence S. Huffman<br>Gary Herman | Injunction<br><br>Judge Light |

| DATE | NO. | PLEADINGS FILED. WRITS ISSUED. WRITS RETURNED AND COPIES OF RETURN |
|---|---|---|
| 1972 Sept. | 15 | 1 Complaint filed. |
| " | 15 | 2 Motion for temporary injunction filed. |
| " | 18 | 3 Notice of Hearing filed. |
| " | 15 | 4 Request for Personal Service filed. |
| " | 18 | Subpena issued. |
| " | 18 | Summons together with copy of complaint,motion and notice issued to the Sheriff of Allen County, Ohio,for personal service upon William H. Dakota,2650 West Market St., Lima, Ohio; and Cinema I. Theatre,by serving William H. Dakota,the manager,# 69 Public Square, Lima, Ohio. |
| " | 18 | Summons together with copy of complaint,motion,notice issued to the Sheriff of Allen County, Ohio,for personal service upon Flora Mary Collins,Moor, 104 S. Dale Dr., Lima, Ohio; and John Doe # 1,John Doe # 2,John Doe # 3,Jane Doe # 1. |
| " | 20 | 5 Amended Complaint filed. |
| " | 20 | 6 Affidavit for service by publication filed. |
| " | 20 | 7 Request for service filed. |
| " | 20 | Summons together with copy of complaint,motion,notice and amended complaint mailed by certified mail;return receipt requested to the defendants, Ateva Leland Samuel Collins, 510 River St. R.D. # 2,Watkins, Ohio 44067; and Cara Lee Collins (Wallace) 1339 Montecello Blvd.,North,St. Petersburg, Florida 33703. Postage ($.75-$1.46). |
| " | 20 | Subpena issued. |
| " | 21 | 8 Summons Returned: I received this summons on September 18,1972, at 9:00 o'clock P.M.,and personal service of it upon William H. Dakota & Cinema I. Theatre,by service of it upon William H. Dakota, the manager,, by [illegible] them and tendering a copy of summons and motion in the case, including the petition,motion for temporary injunction and notice of hearing on September 20,1972. Edward L. Fair. Sheriff. by Charles Harrold, Dep. [illegible] |
| " | 21 | 9 Summons Returned: Sheriff's Return: received this summons on September 18,1972, at 2:00 o'clock P.M.,and made personal service of it upon Flora Mary Collins Moor, John Doe # 1, namely, John Brownell, John Doe # 2,namely Robert Smith aka Sisson, John Doe # 3,namely, Allen R. Brown, Jane Doe #1,namely Geraldine Scott,by locating |

| Defendants | Party-Defendants |
|---|---|
| Lima, Ohio<br><br>Leland Samuel Collins<br>Address Unknown<br><br>Cara Lee Collins<br>Address Unknown<br><br>Pussy Cat Corporation<br># 69 Public Square<br>Lima, Ohio<br>or<br>Los Angeles, California<br><br>Cinema I. Theatre<br># 69 Public Square<br>Lima, Ohio<br><br>John Doe # 1(John Brownell)<br>c/o Cinema I<br># 69 Public Square<br>Lima, Ohio<br><br>John Doe # 2(Robert Smith, aka Sisson)<br>c/o Cinema I<br># 69 Public Square<br>Lima, Ohio<br><br>John Doe # 3 (Allen R. Brown)<br>c/o Cinema I<br># 69 Public Square<br>Lima,Ohio<br><br>John Doe # 4<br>c/o Cinema I<br># 69 Public Square<br>Lima,Ohio<br><br>John Doe # 5<br>c/o Cinema I<br># 69 Public Square<br>Lima,Ohio<br><br>Jane Doe # 1 (Geraldine Scott)<br>c/o Cinema I<br># 69 Public Square<br>Lima,Ohio<br><br>Jane Doe # 2<br>c/o Cinema I<br># 69 Public Square<br>Lima, Ohio | William C. Russell, indiv. James C. and as Guardian of Bruce L. Blair and Corrine E. Russell<br>2752 233rd Street<br>Torrance, California 90505<br><br>Edward L. Russell<br>17 LaCuesta Drive<br>San Rafael, California 94901<br><br>Michael F. Russell<br>17 LaCuesta Drive<br>San Rafael, California 94901<br><br>Patricia L. Fitzgerald<br>3701 Divisadero, Apt. No. 107<br>San Francisco, California<br><br>Irene C. Russell<br>494-C Calle Tadir<br>Laguna Hills, California 92653 |

# APPEARANCE AND EXECUTION Docket CIVIL—2

| NAMES OF PARTIES TO SUIT | ATTORNEYS | ACTION |
|---|---|---|
| The State of Ohio, ex rel. Lawrence S. Huffman<br>-vs-<br>William H. Dakota,et al. | Gary H. Herman | Injunction |

| DATE | | 1972 | PLEADINGS FILED. WRITS ISSUED. WRITS RETURNED AND COPIES OF RETURN |
|---|---|---|---|
| | | | them and tendering a copy of summons and accompanying documents, including the petition,motion for temporary injunction,and notice of hearing on September 18, 1972. Edward L. Pair, Sheriff. By J.F. Garlock.Deputy. |
| Sept. | 22 | 10 | Subpena issued, |
| " | 22 | 11 | Motion filed. |
| " | 25 | 12 | Return Receipt,signed, Sara Wallace filed. |
| " | 25 | 13 | Return Receipt,signed, Leland S. Collins filed. |
| " | 25 | 14 | Memorandum contra motion of Defendant, Flora May Moor to Join Six Defendants filed. |
| " | 25 | 15 | Proof of service of amended complaint filed. |
| " | 25 | 16 | Proof of service of amended complaint filed. |
| " | 26 | 17 | Motion to Quash Subpoena Duces Tecum with Memorandum Attached Filed. |
| " | 26 | 18 | Motion to Dismiss filed. |
| " | 29 | | Subpena issued |
| " | 29 | | Subpena Duces Tecum issued |
| Oct. | 2 | 19 | Judgment Entry joining party defendants filed. |
| " | 3 | | Summons together with copy of complaint,motion and amended complaint mailed by certified mail;return receipt requested to the party-defendants, William H. Russell, indiv. and as guardian of Bruce L. and Corrine F. Russell,2722 [illegible] Dr.,Torrance, Calif.; Edward L. Russell,17 LaVuesta Dr.,San Rafael, Calif.; Michael L. Russell, 17 LaVuesta Dr.,San Rafael, Calif.; Patricia L. Fitzgerald,3701 Divisadero,Apt. 107, San Francisco, Calif.; Irene C. Russell, 498-C Calle Cadiz, Laguna Hills, Calif. Postage ($1.05+$1.25). |
| " | 10 | 20 | Return Receipt,signed, Edward L. Russell filed. |
| " | 10 | 21 | Return Receipt,signed, Irene C. Russell filed. |
| " | 10 | 22 | Return Receipt,signed, Michael L. Russell filed. |
| " | 10 | 23 | Return Receipt,signed, William C. Russell filed. |
| " | 12 | 24 | Supplemental Memoranda Filed. |
| " | 16 | 25 | Summons mailed to Patricia L. Fitzgerald,returned, refused filed. |
| " | 16 | | Summons mailed by regular mail to the Def ndant,Patricia L. Fitzgerald, 3701 Divisadero, Apt. 107, San Francisco, California. Postage ($.40). |
| " | 19 | 26 | Answer filed. |
| " | 20 | 27 | Order filed. |
| " | 25 | 28 | Motion to stay judgment pending appeal filed. |
| " | 30 | 29 | Return on Inventory Filed. |
| " | 30 | 30 | Approval of Return of Inventory filed. |
| " | 31 | 31 | Answer of Defendants, William H. Russell,William C. Russel as guardian of Bruce L. Russell and Corrine F. Russell,Edward L. Russell,Michael L. Russell,Patricia L. Fitzgerald and Irene C. Russell filed. |
| Nov. | 3 | 32 | Order of Serv. Proc. |
| " | 3 | 33 | Not of filing. |
| " | 3 | 34 | Jour al Entry filed. |
| " | 3 | | Subpena issued. |
| " | 3 | 35 | Request filed. |
| " | 6 | | Certified copy of Journal Entry mailed by certified mail, return receipt requested to Leland Samuel Collins 410 River Street N. D. # 2 Madison, Ohio 44057 and Sara Lee Collins (Wallace) 1498 Monticello Boulevard, North Saint Petersburg, Flor.da. 33703. Postage $1.46/ |
| " | 6 | 36 | Journal Entry granting leave to file answer filed. |
| " | 6 | 37 | Answer filed. |
| " | 6 | 38 | Proof of Publication filed The Lima News $216.72 |
| " | 6 | 39 | Motion filed. |
| " | 6 | 40 | Journal Entry on Motion filed. |
| " | 9 | 41 | Return Receipt filed. Signed from Leland Samuel Collins |
| " | 13 | 42 | Return Receipt,signed, William F. Wallace filed. |
| " | 24 | 43 | Journal Entry overruling motion filed. |
| " | 30 | 44 | Journal Entry filed. |
| Dec. | 1 | | Subpena issued. |
| " | 4 | 45 | Motion filed. |
| " | 7 | 46 | This is to certify that the undersigned did mail a copy of the judgment entry granting the permanent injunction in this case to CT Corp. System, the agent for service of process for [illegible] |

# AA-21

## APPEARANCE AND EXECUTION Docket No. [illegible]-2

( Page 3)

| NAMES OF PARTIES TO SUIT | ATTORNEYS | ACTION |
|---|---|---|
| The State of Ohio, ex rel. Lawrence S. Huffman -vs- William H. Dakota, et al, | | |

| DATE | | | PLEADINGS FILED. WRITS ISSUED. WRITS RETURNED AND COPIES OF RETURN |
|---|---|---|---|
| | | | Allen County, Ohio,ss: personally appeared before me a notary public in and for said County, the within named [illegible] who acknowledged that he did sign the foregoing instrument and that the same is his free act and deed. In testimony whereof, I have hereunto subscribed my name and affixed my official seal on this 7th day of December, A.D. 1972. Lima, Ohio; Robert Smith, Attorney at Law. Certificate, Oath and Certificate of Service. Filed and entered of record this 7th day of December, A.D. 1972. Fee $1.00. Earl L. Jr. Sheriff. By Russell L. Stafford, Deputy. Smith,Lima, Ohio. Earl L. Jr. Sheriff. By Russell L. Stafford, Deputy. |
| Dec. | 7 | 47 | The undersigned does hereby certify that on the [illegible] day of [illegible], a certified copy of the foregoing [illegible] was duly served upon the following parties named at the Allen County Courthouse, Lima, Ohio, to-wit: Robert Smith, Esq., Attorney at Law, 220 North Main Street, Lima, Ohio and Earl L. Jr. Sheriff, by Russell L. Stafford, Deputy. |
| " | 7 | 48 | Return: The undersigned does hereby certify that on November 21,197 , a certified copy of the foregoing letter was duly served upon the following parties named at the Allen County Courthouse, Lima, Ohio, to-wit: Harris to the 220 N. Jamestown, Ohio, et al [illegible] and Dakota, Lima, Ohio, to-wit: 400 East North Street, Lima, Ohio. Edward L. Jr. Sheriff, by [illegible], Deputy. |
| " | 8 | 49 | Motion filed. |
| " | 8 | 50 | Subpena filed. |
| " | 11 | 51 | Memorandum of law on effect of removal on state court action filed. |
| " | 11 | 52 | Notice of Removal filed. |
| " | [illegible] | [illegible] | [illegible] |
| " | 21 | 54 | [illegible] |
| 1973 May | 1 | 55 | Motion filed. |
| " | 1 | 56 | Journal Entry setting time of hearing filed [illegible] |
| " | 3 | 57 | Petition for removal filed. |
| " | 3 | 58 | Memorandum of Law on effect of removal on State Court Action filed. |

SEAL

No. 72 CIV 0536 P. Rec. P. Ex. Docket CIVIL—2 Term, A.D. 19

Statement of Costs Sent

Fee Book No. ___ Page ___

TITLE OF CASE

State of Ohio, ex rel. Lawrence S. Huffman
-vs-
William H. Dakota, et al.

| DATE | DEPOSITED BY | AMOUNT | C. B. No. | PAGE |
|---|---|---|---|---|

FINDINGS, JUDGMENTS, ORDERS AND DECREES

Oct. 27, 1972. Upon consideration, defendant motion to stay judgment pending appeal is overruled. Hearing on permanent injunction assigned for November 7, 1972 at 9:00 o'clock A.M. Mr. Huffman to prepare the entry, Robert M. Light Judge.

| COSTS | PLT'F | DEF'T | RECEIPT FOR FEES |
|---|---|---|---|
| Robert H. Dunlap, Clerk Fee Fund | | | |
| Edward L. Fair, Sheriff | | | |
| Execution, Fee Fund | | | |
| Witnesses, see below | | | |
| Official Stenographer | | | |
| Transcript | | | |
| Foreign Sheriff | | | |
| " | " | | |
| " | " | | |
| Printer | | | |
| " | | | |
| " | | | |
| Justice | | | |
| " | | | |
| Constable | | | |
| " | | | |
| Clerk's Release | | | |
| Guardian ad Litem | | | |
| Depositions | | | |
| " | | | |
| Appraisers | | | |
| " | | | |
| " | | | |
| " | | | |
| " | | | |
| " | | | |
| " | | | |
| Witnesses | | | |

C. B. No. ___ Page ___ SATISFACTION

| 647 3 | DOCKET Number 72 0384 | FILING DATE 10 26 72 | 3 44 | 1 | DEMAND $ Inj. | 4714 | DOCKET Number 72 384 |
|---|---|---|---|---|---|---|---|

DAKOTA, William

FAIR, Edward, Sheriff
GARLOCK, Joe, Deputy Sheriff

ATTORNEYS

Ted Iorio
435 S. Rawley St.
Toledo, Ohio 43609

Lawrence J. Huffman
Prosecuting Attorney, Allen County
Lima, Ohio

CAUSE

10/26/72 Civil cover sheet filed.
10/26/72 Complaint filed.
10/26/72 Motion for temporary restraining order filed.
10/26/72 Memo. in support of motions for temporary restraining order and preliminary injunction filed.
10/26/72 Certification of notice to Lawrence Huffman re request for temporary restraining order filed.
10/26/72 Motion for preliminary injunction filed.
10/26/72 Motion to convene a three judge panel filed.
10/26/72 Summons issued. Two copies summons and two copies of all pleadings filed to U. S. Marshal.
10/30/72 Minutes of proceedings filed. NJW. Hearing on motion for temporary restraining order: stip. of counsel re admissions and denials of parts of complaint: arguments of counsel. Matter taken under advisement.
11/2/72 Opinion and Order filed. NJW. State injunction stayed only so far as it affects the showing of films which have not been held to be obscene in a prior adversary hearing. Copy 77(d) to Iorio and Huffman.
12/4/72 2 Summons returned, executed and filed. Both Defts. served 10/27/72 by cert. mail Fees $8.00

Nicholas J. Walinski

FEES PAID 71752 17

NOV 2 1972

UNITED STATES DISTRICT COURT DOCKET

CERTIFIED COPY _____ DATE

UNITED STATES DISTRICT COURT FOR
Northern District of Ohio
Western Division

| DISTRICT/OFFICE | DOCKET Yr. | DOCKET Number | FILING DATE Mo. Day Yr. | | | DEMAND | JUDGE NO. | DOCKET Yr. | DOCKET Number |
|---|---|---|---|---|---|---|---|---|---|
| 647 3 | 72 | 0432 | 12 01 72 | 3 44 | 1 | $ | 4714 | 72 | 432 |

PLAINTIFFS

PURSUE, Ltd.

Ted Iorio
435 S.Hawley St.
Toledo, O. 436-9 (248-5351)

Gilbert H. Deitch,Esq.
Suite 2005, 1175 Peachtree St.,N.E.
Atlanta, Ga. 30309

Robert E. Smith
Suite 507, 102 W. Pennsylvania Ave.
Towson, Maryland 21204

DEFENDANTS

HUFFMAN, LAWRENCE S. in his capacity as Prosecutor Allen County

FAIR, EDWARD, in capacity as Sheriff Allen County, Ohio

Lawrence S. Huffman, Prosecuting Attorney
Allen County, 127-129 N. Pierce St.
Lima, O. 45802 (229-0786)

CAUSE

12/1/72 Civil cover sheet filed.
12/1/72 Complaint for T.R.O., Preliminary and permanent injunction, etc. filed.
12/1/72 Order granting stay of judgment entry of the Allen Co. Common Pleas Court, # 72 CIV 0326 dated 11/30/72 except insofar as any order which may apply to films previously declared obscent in prior hearing filed. NJW. Two true copies to U. S. Marshal, True copy mailed with complaint to Governor John Gilligan and Hon. William Brown, Iorio, Deitch, & Smith
12/1/72 Summons issued. Two copies summons, 2 copies complaint and 2 copies order granting stay to U.S. Marshal.
12/11/72 Designation of three judges by Sixth Circuit Court of Appeals, Judge Walinski, Judge Young and Judge Celebrezze filed.
12/21/72 Order for parties to file briefs in support of their respective positions on or before 1/15/73 filed. NJW. Copy 77(d) mailed to: Smith, Deitch, Huffman and Fair.
12/21/72 Complete pleadings and papers to date prepared and given to Judge Walinski, Judge Young and Judge Celebrezze.
2/22/72 2 Summons returned, Executed & filed. Huffman served 12/5/72; Fair served 12/5/72. Fees $14.00.
12/27/72 Stip. and order that pltfs. may file amended complaint instanter and dofts. may plead or move within 14 days from date of the filing of the amended complaint. NJW. Notice waived. (Copies to Judge Walinski, Judge Young and Judge Celebrezze.)
2-29-72 Pltf. Amendments to Complaint, filed. Copy mailed 12-26-72. (Orig.,4 copies (Copies to Judges Walinski, Young & Celebrezze on 1/4/73)
1/5/73 Deft's. answer to complaint and amendments to complaint filed. Mailed 1/4/73. (Copy to Judge Walinski, Young & Celebrezze on 1/8/73)
1/16/73 Trial brief of defendant filed. Copy mailed 1/15/73. Copy to Judge Celebrecze, Judge Young and Judge Walinski.

Nicholas J. Walinski 71982 23 JAN 2 1973

UNITED STATES DISTRICT COURT DOCKET

CERTIFIED COPY _____ DATE

UNITED STATES DISTRICT COURT FOR:
Northern District of Ohio
Western Division

| FILING OR ORDER DATE | |
|---|---|
| 1/18/73 | Recitation of points and authorities in support of contentions before the Court by plaintiff filed. Mailed 1/17/73. Copy mailed to: Judge Celebreezze, Young and Walinski. |
| 2/12/73 | Motions to dissolve temporary restraining order and to dismiss filed. Mailed 2/9/73. 2/20/73 - Copy to Judge Young, Walinski and Celebreeze. |
| 2/12/73 | Motion for immediate hearing on motions to dissolve T.R.O. and to Dismiss filed. Mailed 2/9/73. Copies mailed to Judge Walinski, Young and Celbbreeze on 2/20/73. |
| 2/12/73 | Proposed order re: motions to dissolve T.R.O. and to Dismiss LODGED. |
| 3/5/73 | Ordered Cause set for pretrial 3/7/73 at 10:00 AM; Hearing set 3/12/73 at 10:30 AM filed. DJY. Copies 77(d) by special delivery to Deitch, Smith, Huffman, Ioris and Judge, Celebrezze |
| 3/12/73 | Supplemental Memorandum of Defts. filed. |
| 3/12/73 | Minutes of Proceedings filed. NJW. Hearing on motion to dissolve Temporary Restraining Order. Arguments of counsel; matter taken under advisement. |
| 4/20/73 | Opinion and Order filed. AJC. DJY. NJW. Defts enjoined from executing portion of Allen County Common Pleas Court's judgment of Nov. 3, 1972 which orders closing of Pltfs theater pursuant to O.R.C. §3767.03; three judge court dissolved and case remanded to NJW for further proceedings under Pltf. claim for damages. Copies 77(d) to Deitch, Smith, Huffman, Iorio and Judge Celcebrzze. |

647 3 | DOCKET Yr. 72 Number 0445 | FILING DATE Mo. 12 Day 11 Yr. 72 | 4 44 | 2 | $ DEMAND Other Inj. | 4714 | DOCKET Yr. 72 Number 445

DIST. OFFICE Type | JUDGE NO.

PLAINTIFFS | DEFENDANTS

HUFFMAN, Lawrence S.
(State of Ohio, ex rel)

DAKOTA, William H. a/k/a Jack Desmond a/k/a William Kern
MOOR, Flora May Collins
COLLINS, Leland Samuel
Defendants cont'd.

- ATTORNEYS -

Lawrence S.Huffman
Prosecuting Attorney
Allen County
Lima, O. 45802

Ted Iorio - 435 S. Hawley St.
Toledo, O. 43609 - (241-3268)
Gilbert Deitch

- CAUSE -

(Entries)

12/11/72 Civil cover sheet filed.
12/11/72 Petition for removal filed.
12/11/72 Notice of removal filed.
12/11/72 $250.00 deposited in Registry as surety for costs.
12/18/72 Motion to remand filed. Mailed 12/15/72.
12/18/72 Memo. in support of motion to remand filed. Mailed 12/15/72.
12/18/72 Motion for immediate hearing filed. Mailed 12/15/72.
2/12/73 Motion for immediate hearing on motion to remand filed. Mailed 2/9/73.
2/12/73 Proposed order re; hearing on motion for immediate hearing on remand LODGED.
3/12/73 Additional Memorandum of Pltf. in Support of Motion to Remand filed.
3/26/73 Opinion and Order filed. NJW. Cause be and hereby is dismissed. Copies 77(d) to Huffman, Iorio and Deithc.

Nicholas J. Walinski

FEE PAID 74cc6 REPORT NO. 23 JAN 2 1973 FILED MAY 2 1973 DATE

ITED STATES DISTRICT COURT DOCKET

TIFIED COPY DATE

UNITED STATES DISTRICT COURT FOR: Northern District of Ohio Western Division

647 3 DISTRICT TYPE | DOCKET Yr 73 Number 0176 | FILING DATE Mo 05 Day 03 Yr 73 | 3 44 2 CLAIMS | DEMAND $ Other | 4711 JUDGE NO | DOCKET Yr 73 Number 176

PLAINTIFFS | DEFENDANTS

Huffman, Lawrence S.
(State of Ohio ex rel)
US

Dakota, William H.
Moor, Flora May Collins
Collins, Leland Samuel
Collins, Sara Lee
Pussy Cat Corp. - Lima
Pussy Cat Corp. - L.A. Calf.
Cinema I. Theatre
Doe, John #1, 2, 3, 4, 5.
Doe, Jane #1, 2.
US

ATTORNEYS

Lawrence S. Huffman, Esq.
Prosecuting Attorney
Allen County, Ohio
Assistant Attorney General
Room 210 71 E. State St.
Columbus, Ohio 43215

Ted Iorio, Esq.
435 South Hawley St.
Toledo, Ohio 43609
Ph.No. 248-5351

Gilbert H. Deitch, Esq
Suite 2005 100 Colony
1175 Peachtree St. N.E.
Atlanta, Georgia 3036
Ph. 892-8890 (404)

CAUSE -

Petition for removal - Civil Rights.

(Docket Entries)

| | |
|---|---|
| 5-3-73 | Civil Covdr Sheet, filed. |
| 5-3-73 | Notice of removal, filed. |
| 5-3-73 | Petition for Removal, filed. Copies served. |
| 5-3-73 | Memo. of Law on Effect of Removal on State Court Action, filed. |
| 5-3-73 | Bond in sum of $250.00 with The Travelers Indemnity Co. as surety, filed. |

PROCEEDINGS | DATE ORDER ENTERED | FEES | RECEIPT NO | CLERK | ASSISTED

Don J. Young, Judge | PAID 74/324

UNITED STATES DISTRICT COURT DOCKET

CERTIFIED COPY _____ DATE

UNITED STATES DISTRICT COURT FOR:
NORTHERN DISTRICT OF OHIO/ W.D.

# AA-28

STATE OF ALABAMA

COUNTY OF MADISON

IN THE CIRCUIT COURT, IN EQUITY

CASE NO. 30845

STATE OF ALABAMA on the Relation of Edgar Enfinger, Chief of Police of the City of Huntsville, Alabama

PETITIONER

Vs.

FIRST AMENDMENT FOUNDATION, INC., a corp. organized and existing under the laws of the State of Louisiana, CHARLES L. MUSICK, JR.; CARLTON L. PITTMAN; [illegible] CORP.; XYZ. CO.; JOHN DOE #1; JOHN DOE #2; JOHN DOE #3; and JOHN DOE #4

RESPONDENTS

FINAL DECREE

This cause being submitted for final decree on the Pre-Trial ORders of February 13 and February 22, 1973, the pleadings, stipulations and the evidence, the Court finds as follows:

1. The respondent, First Amendment Foundation, Inc., a Louisiana Corporation operates the theater called "Cinema Royal" located at 1021 North Memorial Parkway, Huntsville, Alabama and that Charles L. Musick, Jr. and Carlton L. Pittman are President and Vice-president of First Amendment Foundation, Inc. Kenneth Selberg is manager of said theater.

2. The evidence shows the respondents have shown obscene movies as defined by Title 14 § 374(16j) et. seq., Code of Alabama 1940 (Recomp. 1958), by Roth v. U.S. 354 U.S. 476, 1 L Ed. 2d 1498, 77 S. Ct. 1304 or by any other standard that this Court is aware. "Obscene" means lewd, Title 14 § 374 (3) Code of Alabama 1940 (Recomp. 1958). "Lewd" means "obscene" Black's Law Dictionary 4th Ed. p. 1052.

3. Title 7 § 1091 Code of Alabama 1940 (Recomp. 1958) provides that a place where lewdness is conducted, permitted, continued or exists shall constitute a nuisance.

4. The Court finds the respondents have operated their theater so as to constitute a public nuisance under the laws of that State. No intent was shown by the respondents to operate their place of business other than as a public nuisance nor that they had ever operated said theaters in any other manner.

5. That the respondents contentions as outlined in the Pre-Trial Order of February 13, 1973 are not sufficient to deny the relief sought by the petitioner.

It is therefore CONSIDERED, ORDERED, ADJUDGED AND DECREED by the Court:

1. That the respondents are perpetually enjoined from maintaining a nuisance at 1022 North Memorial Parkway, Huntsville, Alabama or elsewhere in the county.

2. That all personal property and contents used in conducting the nuisance shall be removed from 1022 North Parkway, Huntsville, Alabama, and this personal propetty shall be sold in the manner provided for the sale of chattels under execution.

3. That the theater, Cinema Royal, located at 1022 North Memorial Parkway shall be closed for any purpose for the period of one year unless sooner released pursuant to Title 7 § 1104 Code of Alabama 1940 (Recomp. 1958).

4. That the proceeds of the sale of personal property shall be applied in payment of costs of action and abatement and petitioner's costs.

5. Petitioner is denied attorney's fees and the accounting.

This the 23rd day of February, 1973.

JOHN D. SNODGRASS
Circuit Judge

STATE OF ALABAMA — IN THE CIRCUIT COURT, IN EQUITY

COUNTY OF MADISON — CASE NO. 30847

STATE OF ALABAMA on the relation of EUGENE SWEETON, Chief of Police of the City of Huntsville, Alabama — PETITIONER

Vs.

GENERAL CORPORATION, CHARLES E. OUTLAND, FLOYD G. HANDFORD, JEAN PHILLIPS, et al — RESPONDENTS

WRIT OF INJUNCTION

Whereas, the State of Alabama on the relation of Eugene Sweeton, Chief of Police of the City of Huntsville, Alabama, Petitioner, has exhibited its bill of complaint in equity in the Circuit Court of Madison County, and has obtained from the Honorable John D. Snodgrass, Circuit Judge, an order for the issuance of an injunction, and other relief, to enjoin you as hereinafter mentioned; and whereas, in said cause it has been ordered, adjudged, and decreed by the court as follows:

"1. That the respondents are perpetually enjoined from maintaining a nuisance at 205 East Side Square, Huntsville, Alabama or elsewhere in the county.

2. That all personal property and contents used in conducting the nuisance shall be removed from 205 East Side Square, Huntsville, Alabama, and this personal property shall be sold in the manner provided for the sale of chattels under execution.

3. That the theater, Fox Cinema, located at 205 East Side Square, Huntsville, Alabama shall be closed for any purpose for the period of one year unless sooner released pursuant to Title 7 S 1104 Code of Alabama 1940 (Recomp. 1958).

4. That the proceeds of the sale of the personal property shall be applied in payment of costs of action and abatement and petitioner's costs.

5. Petitioner is denied attorney's fees and the accounting.

Now, therefore, you, the said General Corporation and Jean Phillips are hereby enjoined from maintaing a nuisance at 205 East Side Square, Huntsville, Alabama or elsewhere in the

county, and the theater, Fox Cinema, located at 705 East Side Square, Huntsville, Alabama shall be closed for any purpose for the period of one year unless sooner released pursuant to Title 7 s 1104 Code of Alabama 1940 (Recomp. 1958), and this Injunction you are required to obey under the penalties of law, until the further order of this Court.

Witness my hand, this_____day of February, 1973.

Register.

To the Sheriff of Madison County:

You are hereby commanded to execute this writ, and return the same with your endorsement thereon, to this Court, with all convenient speed.

Witness my hand, this_____day of February, 1973.

Register.

FILED IN CLERK'S OFFICE
NORTHERN DISTRICT OF ALABAMA
MAR 8 - 1973
WILLIAM E. DAVIS
CLERK, U.S. DISTRICT COURT
By _____ Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
Northeastern Division

GENERAL CORPORATION, et al, )
Plaintiffs, )
-vs- ) NO. CA 73-194-NE
)
EUGENE SWEETON, et al, )
Defendants. )

## MEMORANDUM OF OPINION AND ORDER

This case came on for hearing on March 7, 1973, on the plaintiffs' motion for a temporary restraining order. The defendants had notice and appeared in opposition to the motion. The material facts are not in dispute, and accordingly the lack of a verified complaint or affidavit is not of itself cause to deny the relief requested.

The three plaintiffs have, until February 23, 1973, operated three "adult" motion picture theatres in Huntsville, Alabama, featuring films which by some would be classified as obscene or lewd. In January 1973, complaints were filed against each of them in the appropriate state court by the "State of Alabama, on relation of Eugene Sweeton, Chief of Police of the City of Huntsville, Alabama", charging them (and the owners of the properties) with the maintenance of a nuisance under Alabama Code, 1940, title 7, §§ 1091 et seq. The essence of the alleged nuisance was that the theatres constituted places "upon which lewdness. . . is conducted, permitted, continued, or exists". On February 23, 1973, a final decree was rendered in the state trial court finding that the theatres had been so operated and ordering that such locations be closed for all purposes for one year (unless sooner released under a statutory procedure), that the personal property and contents of such locations used in conducting the nuisance as so found be sold, and that the operators (and their managers) be "perpetually enjoined from maintaining a nuisance at [the particular location] or elsewhere in the county." (Emphasis added.)

Thereupon the plaintiffs brought this suit under 28 U.S.C. § 1343 and 42 U.S.C.A. § 1983, 1985(3), claiming a violation of their rights under the First Amendment and seeking to enjoin the enforcement of the state court decree. Named as defendants are Skeeton, the City of Huntsville, the City Attorney, and the Circuit Judge who issued the decree.

The relief sought is not prohibited by 28 U.S.C. § 2283. *Mitchum v. Foster*, 40 U.S.L.W. 4737 (S.Ct. June 1972). The state court proceedings sought to be enjoined are not criminal proceedings, and have been considered by the Fifth Circuit of Appeals as constituting a purely civil cause. *80 Drive-In, Inc. v. Bailey*, ____F.2d _____ (5th Cir., #71-3121, October 5, 1972); *cf. Palato v. McAuliffe*, ____F.2d_____(5th Cir., #71-2625, September 21, 1972).

Nevertheless, I conclude that the doctrines of comity and federalism as expressed in the *Younger v. Harris* sextet, 401 U. S. 37 et seq. (1971), are generally applicable, albeit with dimirished intensity, to state court civil actions. *Cf. Hobbs v. Thompson*, 448 F.2d 456 (5th Cir., 1971); *Palato v. McAuliffe*, *supra*. See *Hobbs* also for discussion of the concepts of abstention and exhaustion.

One of the factors for consideration on the issuance of a temporary restraining order is the likelihood of the plaintiffs' prevailing on the merits. It is quite possible that the plaintiffs here will prevail on the merits in attacking an injunction which silences them at three specific locations in the city which have been held to constitute a nuisance, not merely as to presenting films which have been declared by a court to be lewd but as to future films which might or might not be be classified. But it may also be that a state can, on the basis of repeated presentation of obscene films (I assume such to be the case, without deciding) at a particular location, control all "speech" by that person at that same spot. I conclude that there is sufficient doubt as to the likelihood of plaintiffs' succeeding

in that aspect of their suit regarding in *in rem* nature of the nuisance suit as to deny them that relief on a *temporary restraining order*. (This is not to decide against plaintiffs on the merits of such claim, which must await full hearing, whether before a three-judge panel under 28 U.S.C. §§ 2281, 2284, or before a single judge.

However, so far as the state court decree attempts to silence (or "chill") these plaintiffs at other locations in Madison County--i.e., perpetually enjoining them in personam "from maintaining a nuisance . . . elsewhere in the county"--I conclude that the plaintiffs will in all probability prevail on the merits of such claim at final hearing. *See Near v. Minnesota*, 283 U.S. 697. As an anticipatory closing of speech possibly protected by the First Amendment, this part of the injunction constitutes furthermore an extraordinary circumstance with great and immediate harm to the plaintiffs, justifying intervention in state court proceedings by a federal court. (As to that part of the decree which calls for the sale of the personal property and contents at the theatres, the defendants have advised the court that they will not go forward with such sales without first advising this court and the plaintiffs in advance, and accordingly, without regard to whether there should otherwise be cause to stay such proceedings, I conclude that preliminary injunctive relief against such proceedings is not necessary.)

## O R D E R

Upon the findings and conclusions, and for the reasons indicated, it is hereby ORDERED that upon filing by plaintiffs of a bond in the amount of $1,000 pursuant to Rule 65(c), the defendants Eugene Sheaton, Charlet H. Younger (in his capacity as city attorney for the City of Huntsville), the Honorable John D. Snodgrass (in his capacity as Circuit Judge of the Circuit Court in Equity for Madison County, Alabama), and the City of Huntsville, be, and they hereby are, enjoined from enforcing the following provision of the orders heretofore rendered on February 23, 1973, in case number 30846, 30847, and 30848: "That in

respondents are perpetually enjoined from maintaining a nuisance at [described location of threatre] Huntsville, Alabama, or elsewhere in the county." This order in no respect annuls or vitiates the provisions of paragraph 3 of each orders.

This order shall expire upon the holding of a hearing under 28 U.S.C. § 2284(3,4) unless sooner revoked by this court.

This the 7th day of March, 1973.

Sam C Pointer Jr
United States District Judge

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

TO : Honorable Sam C. Pointer, Jr. DATE: March 19, 1973

FROM : JOHN R. BROWN

RECEIVED
MAR 21 1973
SAM C. POINTER, JR.
U. S. DISTRICT JUDGE

SUBJECT : No. 72-194, General Corp. v. Sweeton

My dear Judge Pointer:

I was on the verge of constituting a three-Judge Court but considering it further I have lots of doubts.

Mitchum v. Foster merely holds that §2283 is no bar to a §1983 suit. But most of the cases in the Younger v. Harris group were §1983 suits. As I read Mitchum, it very carefully perserves the equitable restrictions set up in Younger and the related cases. What Mitchum does is avoid any problems posed by §2283 as such. In many cases §2283 will be an obstacle which has to first be hurdled before getting to Younger v. Harris equitable consideration.

It strikes me that we have something even more serious from an equitable standpoint. As I understand it from hurriedly reading the papers, a final decree in the Alabama Courts has been entered in 1973 requiring that the theaters be closed. I know of no right to enjoin the enforcement of a State Court decree.

The easy way out, of course, is to constitute a three-Judge Court. This burden is so heavy now on Judges, both District and Circuit who have to travel from place to place to consider the preliminary matters, that I like to ascertain in advance whether there is any sound basis for constituting the three-Judge Court.

I would suggest that you call for extended briefs on this, and I am taking the occasion to send copies of this letter on to Judges Gewin and Godbold with whom I would urge you to consult very freely and informally. It will fall to one of them. If there is doubt, then the safe course is to constitute a Court and I will do so immediately.

I would think that this thing is sort of analogous to this sort of situation. Suppose a case in which a criminal charge has been initiated that involves a constitutional denial of a kind which the prosecution could be enjoined either under Younger v. Harris, §2283 or both, but the case goes to trial with no such effort made. Can a Federal Court after the decree of conviction and the affirmance on the Appellate Court enjoin it. I think not. I see no real difference here simply because this is a civil proceeding.

This view, of course, recognizes that out of the sheer magnitute of this general problem we have to be careful that we do not encourage more and more three-Judge requests and add to the burdens which are already considerable.

Will you please put Judges Gewin and Godbold in possession of the necessary papers.

Sincerely yours,

JRB

JRB:sb
cc: Hon. Walter P. Gewin
Hon. John C. Godbold